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INTERNATIONAL LAW

A TREATISE

BY

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VOL. I.

PEACE



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TO

EDWARD ARTHUR WHITTUCK

WHOSE SYMPATHY AND ENCOURAGEMENT

HAVE ACCOMPANIED THE PROGRESS OF THIS WORK

FROM ITS INCEPTION TO ITS CLOSE

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PREFACE

Although this treatise on the Law of Nations appears in two volumes, it is intended to be an elementary book for those who are beginning to study International Law. It is a book for students written by a teacher. The majority of the people in this country who take an interest in International Law are not jurists and have no legal training, as my classes at the London School of Economics and Political Science (University of London) show. For this reason, in lectures as well as in a treatise on the Law of Nations, certain truisms must be repeated again and again, and much that is obvious to the trained jurist must, to insure comprehension, be pointed out at some length.

My work endeavours to give a complete survey of the subject. All important points are discussed, and in notes the reader is referred to other books which go more deeply into the subject. And the list of treatises as well as monographs printed at the commencement of each topic will, I hope, be welcome to those who desire to look up a particular point. There is no English treatise which provides such a bibliography. Naturally, my catalogue is not exhaustive, although English, French,

German, Italian, Russian, Swiss, Belgian, Portuguese, American, and Spanish-American authors are represented. And as a rule I have avoided giving references to articles contained in periodicals. But my readers will find these as well as other references in the books quoted. In any case they will know where to find something on any subject in which they take a special interest. That I have everywhere quoted Phillimore, Twiss, and Hall, and have as regards the detail of many points referred my readers to these classics of international jurisprudence, was a matter of course. I should, however, specially mention that I had to quote Hall's treatise in its fourth edition (1895) because the editor of the fifth edition has abandoned the section-marks (§§) in the divisions of the book.

I have tried to the best of my power to build my system and my doctrines on a thorough jurisprudential, which is equivalent to a positive, basis. My definitions are as sharp as possible. Readers may be assured that those definitions in my book which are more or less ambiguous have been intentionally so framed because the actualities on which they are based are not altogether clear. My system itself is, I hope, lucid in its arrangement of topics. An Introduction deals with the Foundation of International Law and gives a sketch of its Development and Scientific Treatment. The First Part comprises the whole matter concerning the Subjects of the Law of Nations—viz. the States and those of their relations which are derived from their very membership of the

Family of Nations. The Second Part deals with the Objects of the Law of Nations—namely, State Territory, the Open Sea, and Individuals. As the States possess Organs for their International Relations, these Organs are treated in the Third Part. The Fourth Part, which deals with International Transactions, concludes the first volume, except for an Appendix comprising the text of the Anglo-French Agreement. The second volume, which is ready in the draft and to which readers are frequently referred in the notes in this first volume, will appear next year and will deal with the Settlement of International Differences, War, and Neutrality.

As regards the method pursued, I should like to point out that I have everywhere endeavoured to let differences of opinion appear in a clear light. It is necessary that those who seek information in a treatise should find an opinion for their guidance. For this reason I have everywhere tried to establish either the opinion I approve or my own opinion as firmly as possible, but I have nearly always taken pains to put other opinions, if any, before my readers. The whole work, I venture to hope, contains those suggestive and convincing qualities which are required in a book for students. Yet I have, on the other hand, been careful to avoid pronouncing rules as established which are not yet settled. My book is intended to present International Law as it is, not as it ought to be.

I owe thanks to many friends for advice and assistance. I must specially mention Mr. W. J.

Addis, M.A., Headmaster of the Holborn Estate Grammar School, to whose scholarly knowledge of language and literary insight I have been constantly indebted, and Mr. Alfred Bucknill, M.A., of the Inner Temple, Barrister-at-Law, who has lent me his most valuable assistance in preparing the MS. for the press and reading the proofs.

L. OPPENHEIM.

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February 20, 1905.

Errata.

Page 88, line 19, *for* Fanchille *read* Fauchille.
„ 122, note 1, line 4, *for* Snow *read* Scott.
„ 303, line 8, *for* 1680 *read* 1580.

ABBREVIATIONS

OF TITLES OF BOOKS, ETC., QUOTED IN THE TEXT

The books referred to are, as a rule, quoted with their full titles and the date of their publication. But certain books and periodicals which are very often referred to throughout this work are quoted in an abbreviated form, as follows:—

Annuaire	=	Annuaire de l'Institut de Droit International.
Bluntschli	=	Bluntschli, Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 3rd ed. (1878).
Bonfils	=	Bonfils, Manuel de Droit International Public, 4th ed. by Fauchille (1904).
Bulmerincq	=	Bulmerincq, Das Völkerrecht (1887).
Calvo	=	Calvo, Le Droit International etc., 5th ed. 6 vols. (1896).
Despagnet	=	Despagnet, Cours de Droit International Public, 2nd ed. (1899).
Field	=	Field, Outlines of an International Code (1872).
Fiore	=	Fiore, Nouveau Droit International Public, deuxième édition, traduite de l'Italien et annotée par Antoine, 3 vols. (1885).
Gareis	=	Gareis, Institutionen des Völkerrechts, 2nd ed. (1901).
Grotius	=	Grotius, De Jure Belli ac Pacis (1625).
Hall	=	Hall, A Treatise on International Law, 4th ed. (1895).
Halleck	=	Halleck, International Law, 3rd English ed. by Sir Sherston Baker, 2 vols. (1893).
Hartmann	=	Hartmann, Institutionen des praktischen Völkerrechts in Friedenszeiten (1874).
Heffter	=	Heffter, Das Europäische Völkerrecht der Gegenwart, 8th ed. by Geffcken (1888).

Heilborn, System	=	Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896).
Holland, Studies	=	Holland, Studies in International Law (1898).
Holland, Jurisprudence	=	Holland, The Elements of Jurisprudence, 6th ed. (1893).
Holtzendorff	=	Holtzendorff, Handbuch des Völkerrechts, 4 vols. (1885–1889).
Klüber	=	Klüber, Europäisches Völkerrecht, 2nd ed. by Morstadt (1851).
Lawrence	=	Lawrence, The Principles of International Law, 3rd ed. (1900).
Lawrence, Essays	=	Lawrence, Essays on some Disputed Questions of Modern International Law (1884).
Liszt	=	Liszt, Das Völkerrecht, 3rd ed. (1904)
Lorimer	=	Lorimer, The Institutes of International Law, 2 vols. (1883–1884).
Maine	=	Maine, International Law, 2nd ed. (1894).
Manning	=	Manning, Commentaries on the Law of Nations, new ed. by Sheldon Amos (1875).
Martens	=	Martens, Völkerrecht, German translation of the Russian original in 2 vols. (1883).
Martens, G. F.	=	G. F. Martens, Précis du Droit des Gens Moderne de l'Europe, nouvelle éd. by Vergé, 2 vols. (1858).
Martens, R. Martens, N. R. Martens, N. S. Martens, N. R. G. Martens, N. R. G., 2nd Ser.		These are the abbreviated quotations of the different parts of Martens, Recueil de Traités (see p. 94 of this volume), which are in common use.
Martens, Causes Célèbres	=	Martens, Causes Célèbres du Droit des Gens, 5 vols., 2nd ed. (1858–1861)
Nys	=	Nys, Le Droit International, vol. i. (1904).
Perels	=	Perels, Das internationale öffentliche Seerecht der Gegenwart, 2nd ed. (1903).
Phillimore	=	Phillimore, Commentaries upon International Law, 4 vols. 3rd ed. (1879–1888).

Piedelièvre	=	Piedelièvre, Précis de Droit International Public, 2 vols. (1894–1895).
Pradier-Fodéré	=	Pradier-Fodéré, Traité de Droit International Public, 7 vols. (1885–1897).
Pufendorf	=	Pufendorf, De Jure Naturae et Gentium (1672).
Rivier,	=	Rivier, Principes du Droit des Gens, 2 vols. (1896).
R.I.	=	Revue de Droit International et de Législation Comparée.
R.G.	=	Revue Général de Droit International Public.
Taylor	=	Taylor, A Treatise on International Public Law (1901).
Testa	=	Testa, Le Droit Public International Maritime, traduction du Portugais par Boutiron (1886).
Twiss	=	Twiss, The Law of Nations, 2 vols., 2nd ed. (1887–1884).
Ullmann	=	Ullmann, Völkerrecht, 1898.
Vattel	=	Vattel, Le Droit des Gens, 4 books in 2 vols., nouvelle éd. (Neuchâtel, 1773).
Walker	=	Walker, A Manual of Public International Law (1895).
Walker, History	=	Walker, A History of the Law of Nations, vol. i. (1899).
Walker, Science	=	Walker, The Science of International Law, (1893).
Westlake	=	Westlake, International Law, vol. i. (1904).
Westlake, Chapters	=	Westlake, Chapters on the Principles of International Law (1894).
Wharton	=	Wharton, A Digest of the International Law of the United States, 3 vols. (1886).
Wheaton	=	Wheaton, Elements of International Law, 8th American ed. by Dana (1866).

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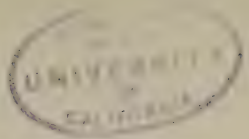
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INTRODUCTION

FOUNDATION AND DEVELOPMENT OF THE LAW OF NATIONS



CHAPTER I

FOUNDATION OF THE LAW OF NATIONS

I

The Law of Nations as Law

Hall, pp. 14-16—Maine, pp. 50-53—Lawrence, §§ 1-3—Phillimore, I., §§ 1-12—Twiss, I. §§ 104-5—Taylor, § 2—Westlake, I. pp. 1-13—Walker, History, I. §§ 1-8—Halleck, I. pp. 46-55—Ullmann, §§ 1-2—Heffter, §§ 1-5—Holtzendorff in Holtzendorff, I. pp. 19-26—Nys, I. pp. 133-43—Rivier, I. § 1—Bonfils, Nos. 26-31—Pradier-Fodéré, I. Nos. 1-24—Martens, I. §§ 1-5—Fiore, I. Nos. 186-208.

Conception of the Law of Nations.

§ 1. Law of Nations or International Law (*Droit des gens*, *Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other. Such part of these rules as is binding upon all the civilised States without exception is called *universal* International Law, in contradistinction to *particular* International Law, which is binding on two or a few States only. But it is also necessary to distinguish *general* International Law. This name must be given to the body of such rules as are binding upon a great many States, including leading Powers. General International Law, as for instance the Declaration of Paris of 1856, or the Hague Regulations of 1899 concerning the law of warfare on land, has a tendency to become universal International Law.

International Law in the meaning of the term as used in modern times did not exist during antiquity

and the first part of the Middle Ages. It is in its origin essentially a product of Christian civilisation, and began gradually to grow from the second half of the Middle Ages. But it owes its existence as a systematised body of rules to the Dutch jurist and statesman Hugo Grotius, whose work "De jure belli ac pacis libri III" appeared in 1625 and became the foundation of all later development.

The Law of Nations is a law for the intercourse of States with one another, not a law for individuals. As, however, there cannot be a sovereign authority above the single sovereign states, the Law of Nations is a law *between*, not above, the single States, and is, therefore, since Bentham, also called "International Law."

As the distinction of Bentham between International Law public and private has been generally accepted, it is necessary to emphasise that only the so-called public International Law, which is identical with the Law of Nations, is International Law, whereas the so-called private International Law is not. The latter concerns such matters as fall at the same time under the jurisdiction of two or more different States. And as the Municipal Laws of different States are frequently in conflict with each other respecting such matters, jurists belonging to different countries endeavour to find a body of principles according to which such conflicts can be avoided.

Legal Force of the Law of Nations contested.

§ 2. Almost from the beginning of the science of the Law of Nations the question has been discussed whether the rules of International Law can be called legally binding. Hobbes[1] already and Pufendorf[2] had answered the question in the negative. And during the nineteenth century Austin[3] and his

[1] De Cive, XIV. 4.
[2] De Jure Naturæ et Gentium, II. c. iii. § 22.
[3] Lectures on Jurisprudence, VI

followers take up the same attitude. They define law as a body of rules for human conduct set and enforced by a sovereign political authority. If indeed this definition of law be correct, the Law of Nations cannot be called law. For International Law is a body of rules for the relations of Sovereign States between one another. And there is not and cannot be a sovereign political authority above the Sovereign States which could enforce such rules. But this definition of law is not correct. It covers only the written or statute law within a State, that part of the Municipal Law which is expressly made by statutes of Parliament in a constitutional State or by some sovereign authority in a non-constitutional State. It does not cover that part of Municipal Law which is called unwritten or customary law. There is, in fact, no community and no State in the world which could exist with written law only. Everywhere there is customary law in existence besides the written law. This customary law was never expressly enacted by any law-giving body, or it would not be merely customary law. Those who define law as rules set and enforced by a sovereign political authority do not deny the existence of customary law. But they maintain that the customary law has the character of law only through the indirect recognition on the part of the State which is to be found in the fact that courts of justice apply the customary in the same way as the written law, and that the State does not prevent them from doing so. This is, however, nothing else than a fiction. Courts of justice having no law-giving power could not recognise unwritten rules as law if these rules were not law before that recognition, and States recognise unwritten rules as law only because courts of justice do so.

Characteristics of Rules of Law.

§ 3. For the purpose of finding a correct definition of law it is indispensable to compare morality and law with each other, for both lay down rules, and to a great extent the same rules, for human conduct. Now the characteristic of rules of morality is that they apply to conscience, and to conscience only. An act loses all value before the tribunal of morality, if it was not done out of free will and conscientiousness, but was enforced by some external power or was done out of some consideration which lies without the boundaries of conscience. Thus, a man who gives money to the hospitals for the purpose that his name shall come before the public does not act morally, and his deed is not a moral one, though it appears to be one outwardly. On the other hand, the characteristic of rules of law is that they shall eventually be enforced by external power.[1] Rules of law apply, of course, to conscience quite as much as rules of morality. But the latter require to be enforced by the internal power of conscience only, whereas the former require to be enforced by some external power. When, to give an illustrative example, morality commands you to pay your debts, it hopes that your conscience will make you pay your debts. On the other hand, if the law gives the same command, it hopes that, if the conscience has not sufficient power to make you pay your debts, the fact that, if you will not pay, the bailiff will come into your house, will do so.

Law-giving Authority not essential for

§ 4. If these are the characteristic signs of morality and of law, we are justified in stating the principle: A rule is a rule of morality, if by

[1] Westlake, Chapters, p. 12, seems to make the same distinction between rules of law and of morality, and Twiss, I. § 105 adopts it *expressis verbis*.

common consent of the community it applies to conscience and to conscience only; whereas, on the other hand, a rule is a rule of law, if by common consent of the community it shall eventually be enforced by external power. Without some kind both of morality and law, no community has ever existed or could possibly exist. But there need not be, at least not among primitive communities, a law-giving authority within a community. Just as the rules of morality are growing through the influence of many different factors, so the law can grow without being expressly laid down and set by a law-giving authority. Wherever we have an opportunity of observing a primitive community, we find that some of its rules for human conduct apply to conscience only, whereas others shall by common consent of the community be enforced; the former are rules of morality only, whereas the latter are rules of law. For the existence of law neither a law-giving authority nor courts of justice are essential. Whenever a question of law arises in a primitive community, it is the community itself and not a court which decides it. Of course, when a community is growing out of the primitive condition of its existence and becomes more and more so enlarged that it turns into a State in the sense proper of the term, the necessities of life and altered circumstances of existence do not allow the community itself any longer to do anything and everything. And the law can now no longer be left entirely in the hands of the different factors which make it grow gradually from case to case. A law-giving authority is now just as much wanted as a governing authority. It is for this reason that we find in every State a Government, which makes and enforces laws, and courts of justice, which administer the laws.

the Existence of Law.

However, if we ask whence does the power of the Government to make and enforce laws come, there is no other answer than this: From the common consent of the community. Thus in this country Parliament is the law-making body by common consent. An Act of Parliament is law, because the common consent of Great Britain is behind it. That Parliament has law-making authority is law itself, but unwritten and customary law. Thus the very important fact comes to light that all statute or written law is based on unwritten law in so far as the power of Parliament to make Statute Law is given to Parliament by unwritten law. It is the common consent of the British people that Parliament shall have the power of making rules which shall be enforced by external power. But besides the statute laws made by Parliament there exist and are constantly growing other laws, unwritten or customary laws, which are day by day recognised through courts of justice.

Definition and three Essential Conditions of Law.

§ 5. On the basis of the results of these previous investigations we are now able to give a definition of law. We may say that *law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.*

The essential conditions of the existence of law are, therefore, threefold. There must, first, be a community. There must, secondly, be a body of rules for human conduct within that community. And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power. It is not an essential condition either that the respective rules of conduct must be written rules, or that there should be a law-making authority

or a law-administering court within the respective community. And it is evident that, if we find this definition of law correct, and accept these three essential conditions of law, the existence of law is not limited to the State community only, but is to be found everywhere where there is a community. The best example of the existence of law outside the State is the law of the Roman Catholic Church, the so-called Canon Law. This Church is an organised community whose members are dispersed over the whole surface of the earth. They consider themselves bound by the rules of the Canon Law, although there is no sovereign political authority that sets and enforces those rules, the Pope and the bishops and priests being a religious authority only. But there is an external power through which the rules of the Canon Law are enforced—namely, the punishments of the Canon Law, such as excommunication, refusal of sacraments, and the like. And the rules of the Canon Law are in this way enforced by common consent of the whole Roman Catholic community.

Law not to be identified with Municipal Law.

§ 6. But it must be emphasised that, if there is law to be found in every community, law in this meaning must not be identified with the law of States, the so-called Municipal Law,[1] just as the conception of State must not be identified with the conception of community. The conception of community is a wider one than the conception of state. A State is a community, but not every community is a State. Likewise the conception of law pure and simple is a wider one than that of Municipal Law. Municipal Law is law, but not every law is Municipal Law, as, for instance, the Canon Law is not. Municipal Law is a

[1] Throughout this book the term "Municipal Law" is made use of in the sense of national or State law in contradistinction to International Law.

narrower conception than law pure and simple. The body of rules which is called the Law of Nations might, therefore, be law in the strict sense of the term, although it might not possess the characteristics of Municipal Law. To make sure whether the Law of Nations is or is not law, we have to inquire whether the three essential conditions of the existence of law are to be found in the Law of Nations.

The "Family of Nations" a Community.

§ 7. As the first condition is the existence of a community, the question arises, whether an international community exists whose law could be the Law of Nations. Before this question can be answered, the conception of community must be defined. A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals. This definition of community covers not only a community of individual men, but also a community of individual communities such as individual States. A Confederation of States is a community of States. But is there a universal international community of all individual States in existence? This question is decidedly to be answered in the affirmative as far as the States of the civilised world are concerned. Innumerable are the interests which knit all the individual civilised States together and which create constant intercourse between these States as well as between their subjects. As the civilised States are, with only a few exceptions, Christian States, there are already religious ideas which wind a band around them. There are, further, science and art, which are by their nature to a great extent international, and which create a constant exchange of ideas and opinions between the subjects

of the different States. Of the greatest importance are, however, agriculture, industry, and trade. It is totally impossible even for the largest empire to produce everything its subjects want. Therefore, the productions of agriculture and industry of the different States must be exchanged with each other, and it is for this reason that international trade is an unequalled factor for the welfare of every civilised State. Even in antiquity, when every State tried to be a world in itself, States did not and could not exist without some sort of international trade. It is international trade which has created navigation on the high seas and on the rivers flowing through different States. It is, again, international trade which has called into existence the nets of railways covering the continents, the international postal and telegraphic arrangements, the Transatlantic telegraphic cables.

The manifold interests which knit all the civilised States together and create a constant intercourse between one another, have long since brought about the necessity that these States should have one or more official representatives living abroad. Thus we find everywhere foreign ambassadors and consuls. They are the agents who further the current stream of transactions between the Governments of the different States. A number of International Offices, International Bureaux, International Commissions have permanently been appointed for the administration of international business. And from time to time special international conferences and congresses of delegates of the different States are convoked for discussing and settling matters international. Though the individual States are sovereign and independent of each other, though there is no

international Government above the national ones, though there is no central political authority to which the different States are subjected, yet there is something mightier than all the powerful separating factors: namely, the common interests. And these common interests and the necessary intercourse which serves these interests, unite the separate States into an indivisible community. For many hundreds of years this community has been called "Family of Nations" or "Society of Nations."

The "Family of Nations" a Community with Rules of Conduct.

§ 8. Thus the first essential condition for the existence of law is a reality. The single States make altogether a body of States, a community of individual States. But the second condition cannot be denied either. For hundreds of years more and more rules have grown up for the conduct of the States between each other. These rules are to a great extent customary rules. But side by side with these customary and unwritten rules more and more written rules are daily created by international agreements. The so-called Law of Nations is nothing else than a body of customary and conventional rules regulating the conduct of the individual States with each other.

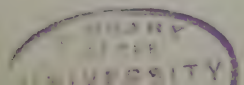
External Power for the Enforcement of Rules of International Conduct.

§ 9. But how do matters stand concerning the third essential condition for the existence of law? Is there a common consent of the community of States that the rules of international conduct shall be enforced by external power? There cannot be the slightest doubt that this question must be affirmatively answered, although there is no central authority to enforce those rules. The heads of the civilised States, their Governments, their Parliaments, and public opinion of the whole of civilised humanity, agree and consent that the body of rules of inter-

national conduct which is called the Law of Nations shall be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations. And in the necessary absence of a central authority for the enforcement of the rule of the Law of Nations, the States have to take the law into their own hands. Self-help and the help of the other States which sympathise with the wronged one are the means by which the rules of the Law of Nations can be and actually are enforced. It is true that these means have many disadvantages, but they are means which have the character of external power. Compared with Municipal Law and the means at disposal for its enforcement, the Law of Nations is certainly the weaker of the two. A law is the stronger, the more guarantees are given that it can and will be enforced. Thus, the law of a State which is governed by an uncorrupt Government and the courts of which are not venal is stronger than the law of a State which has a corrupt Government and venal judges. It is inevitable that the Law of Nations must be a weaker law than Municipal Law, as there is not and cannot be an international Government above the national ones which could enforce the rules of International Law in the same way as a national Government enforces the rules of its Municipal Law. But a weak law is nevertheless still law, and the Law of Nations is by no means so weak a law as it sometimes seems to be.

Practice recognises Law of Nations as Law.

§ 10. The fact is that theorists only are divided concerning the character of the Law of Nations as real law. In practice International Law is constantly recognished as law. The Governments and Parliaments of the different States are of opinion that they



are legally, not morally only, bound by the Law of Nations, although they cannot be forced to go before a court in case they are accused of having violated it. Likewise, public opinion of all civilised States considers every State legally bound to comply with the rules of the Law of Nations, not taking notice of the opinion of those theorists who maintain that the Law of Nations does not bear the character of real law. And the different States not only recognise the rules of International Law as legally binding in innumerable treaties and emphasise every day the fact that there is a law between themselves. They moreover recognise this law by their Municipal Laws ordering their officials, their civil and criminal courts, and their subjects to take up such an attitude as is in conformity with the duties imposed upon their Sovereign by the Law of Nations. If a violation of the Law of Nations occurs on the part of an individual State, public opinion of the civilised world, as well as the Governments of other States, stigmatise such violation as a violation of law pure and simple. And countless treaties concerning trade, navigation, post, telegraphy, copyright, extradition, and many other objects exist between civilised States, which treaties altogether rest on the existence of a law between the States, presuppose such a law, and contribute through their very existence to the development and the growth of such a law.

Violations of this law are certainly frequent. But the violators always try to prove that their acts do not contain a violation, and that they have a right to act as they do according to the Law of Nations, or at least that no rule of the Law of Nations is against their acts. Has ever a State confessed that it was going to break the Law of Nations or that it

ever did so? The fact is that States, in breaking the Law of Nations, never deny its existence, but recognise its existence through the endeavour to interpret the Law of Nations in such a way as is favourable to their act.

II

Basis of the Law of Nations

Common Consent the Basis of Law.

§ 11. If law is, as defined above (§ 5), a body of rules for human conduct within a community which by common consent of this community shall be enforced through external power, common consent is the basis of all law. What, now, does the term "common consent" mean? If it meant that all the individuals who are members of a community must at every moment of their existence expressly consent to every point of law, such common consent would never be a fact. The individuals, who are the members of a community, are successively born into it, grow into it together with the growth of their intellect during adolescence, and die away successively to make room for others. The community remains unaltered, although a constant change takes place in its members. "Common consent" can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction to its single members. The question where such a common consent is to be stated, is not a question of theory, but of fact only. It is a matter of observation and appreciation, and not of logical and mathe-

matical decision, just as the celebrated question, how many grains make a heap? Those legal rules which come down from ancestors to their descendants remain law so long only as they are supported by common consent of these descendants. New rules can only become law if they find common consent on the part of those who constitute the community at the time. It is for that reason that custom is at the background of all law, whether written or unwritten.

Common Consent of the Family of Nations the Basis of International Law.

§ 12. What has been stated with regard to law pure and simple applies also to the Law of Nations. However, the community for which this Law of Nations is authoritative consists not of individual human beings, but of individual States. And whereas in communities consisting of individual human beings there is a constant and gradual change of the members through birth, death, emigration, and immigration, the Family of Nations is a community within which no such constant change takes place, although now and then a member disappears and a new member steps in. The members of the Family of Nations are therefore not born into that community and they do not grow into it. New members are simply received into it through express or tacit recognition. It is therefore necessary to scrutinise more closely the common consent of the States, which is the basis of the Law of Nations.

The customary rules of this law have grown up by common consent of the States—that is, the different States have acted in such a manner as includes their tacit consent to these rules. As far as the process of the growth of a usage and its turning into a custom can be traced back, customary rules of the Law of Nations came into existence

in the following way. The intercourse of States with each other necessitated some rules of international conduct. Single usages, therefore, gradually grew up, the different States acting in the same or in a similar way when an occasion arose. As some rules of international conduct were from the end of the Middle Ages urgently wanted, the theory of the Law of Nations prepared the ground for their growth by constructing certain rules on the basis of religious, moral, rational, and historical reflections. Hugo Grotius's work, "De jure belli ac pacis libri III" (1625), offered a systematised body of rules, which recommended themselves so much to the needs and wants of the time that they became the basis of the following development. Without the conviction of the Governments and of public opinion of the civilised States that there ought to be legally binding rules for international conduct, on the one hand, and, on the other hand, without the pressure exercised upon the States by their interests and the necessity for the growth of such rules, the latter would never have grown up. When afterwards it became apparent that customs and usages alone were not sufficient or not sufficiently clear, new rules were created through treaties being concluded which laid down rules for future international conduct. Thus conventional rules gradually grew up side by side with customary rules.

New States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in existence at the time of their admittance. It is therefore not necessary to prove for every single rule of International Law that every single member of the Family

of Nations consented to it. No single State can say on its admittance into the Family of Nations that it desires to be subjected to such and such a rule of International Law, and not to others. The admittance includes the duty to submit to all the existing rules, with the only exception of those which, such as the rules of the Geneva Convention for instance, are specially stipulated for such States only as have concluded or later on acceded to a certain international treaty containing the respective rules.

On the other hand, no State which is a member of the Family of Nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations. The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one State. This applies not only to customary rules, but also to such conventional rules as have been called into existence through a treaty for the purpose of creating a permanent mode of future international conduct without a right of the signatory powers to give notice of withdrawal. It would, for instance, be a violation of International Law on the part of a signatory Power of the Declaration of Paris of 1856 to declare that it would cease to be a party. But it must be emphasised that this does not apply to such conventional rules as are stipulated by a treaty which expressly reserves the right to the signatory Powers to give notice.

States the Subjects of the Law of Nations.

§ 13. Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. This means that the Law of Nations is a law for the international

conduct of States, and not of their citizens. Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, such as a king or an ambassador for example, is never directly a subject of International Law. Therefore, all rights which might necessarily be granted to an individual human being according to the Law of Nations are not international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the respective State by International Law. Likewise, all duties which might necessarily be imposed upon individual human beings according to the Law of Nations are not international duties, but duties imposed by Municipal Law in accordance with a right granted to or a duty imposed upon the respective State by International Law. Thus the privileges of an ambassador are granted to him by the Municipal Law of the State to which he is accredited, but such State has the duty to grant these privileges according to International Law. Thus, further, the duties incumbent upon officials and subjects of neutral States in time of war are imposed upon them by the Municipal Law of their home States, but these States have, according to International Law, the duty of imposing the respective duties upon their officials and citizens.[1]

Equality an Inference from the Basis of International Law.

§ 14. Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law.

[1] The importance of the fact that subjects of the Law of Nations are States exclusively is so great that I consider it necessary to emphasise it again and again throughout this book. See, for instance, below, §§ 289, 344, 384. It should, however, already be mentioned here that this assertion is even nowadays still sometimes contradicted; see, for instance, Kaufmann, Die Rechtskraft des Internationalen Rechts (1899), *passim*.

States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty and of the fact that the Law of Nations is a law between, not above, the States.[1]

III

Sources of the Law of Nations

Hall, pp. 5–14—Maine, pp. 1–25—Lawrence, §§ 61–66—Phillimore, I. §§ 17–33—Twiss, I. §§ 82–103—Taylor, §§ 30–36—Westlake, I. pp. 14–19—Wheaton, § 15—Halleck, I. pp. 55–64—Ullmann, § 7—Heffter, § 3—Holtzendorff in Holtzendorff, I. pp. 79–158—Rivier, I. § 2—Nys, I. pp. 144–165—Bonfils, Nos. 45–63—Pradier-Fodéré, I. Nos. 24–35—Martens, I. § 43—Fiore, I. Nos. 224–238—Calvo, I. §§ 27–38—Bergbohm, "Staatsverträge und Gesetze als Quellen des Völkerrechts" (1877)—Jellinek, "Die rechtliche Natur der Staatsverträge" (1880).

Source in Contradistinction to Cause.

§ 15. The different writers on the Law of Nations disagree widely with regard to kinds and numbers of sources of this law. The fact is that the term "source of law" is made use of in different meanings by the different writers on International Law. It seems to me that most writers confound the conception of "source" with that of "cause," and through this mistake come to a standpoint from which certain factors which influence the growth of International Law appear as sources of rules of the Law of Nations. This mistake can be avoided by going back to the meaning of the term "source" in general. Source means a spring or well, and has to be defined

[1] See below, §§ 115–116, where the legal equality of States in contradistinction to their political inequality is discussed, and where it will also be shown that not-full Sovereign States are not equals to full Sovereign States.

as the rising from the ground of a stream of water. When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water. Source signifies only the natural rising of water from a certain spot of the ground, whatever natural causes there may be for that rising. If we apply the conception of source in this meaning to the term "source of law," the confusion of source with cause cannot arise. Just as we see streams of water running over the surface of the earth, so we see, as it were, streams of rules running over the area of law. And if we want to know whence these rules come, we have to follow these streams upwards until we come to their beginning. Where we find that such rules rise into existence, there is the source of them. Of course, rules of law do not rise from a spot on the ground as water does; they rise from facts in the historical development of a community. Thus in this country a good many rules of law rise every year from the Acts of Parliament. "Source of Law" is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force.

The two Sources of International Law.

§ 16. As the basis of the Law of Nations is the common consent of the member States of the Family of Nations, it is evident that there must exist, and can only exist, as many sources of International Law as there are facts through which such a common consent can possibly come into existence. Of such facts there are only two. A State may, just as an individual, give its consent either directly by an express

declaration or tacitly by conduct which it would not follow in case it did not consent. The sources of International Law are therefore twofold—namely: (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively[1] the sources of the Law of Nations.

Custom in Contradistinction to Usage.

§ 17. Custom is the older and the original source of International Law in particular as well as of law in general. Custom must not be confounded with usage. In every-day life and language both terms are used synonymously, but in the language of the jurist they have two distinctly different meanings. Jurists speak of a custom, when a clear and continuous habit of doing certain actions has grown up under the ægis of the conviction that these actions are legally necessary or legally right. On the other hand, jurists speak of a usage, when a habit of doing certain actions has grown up without there being the conviction of their legal character. Thus the term "custom" is in juristic language a narrower conception than the term "usage," as a certain conduct may be usual without being customary. A certain conduct of States concerning their international relations may therefore be usual without being the outcome of customary International Law.

As usages have a tendency to become custom, the question presents itself, at what time a usage turns

[1] Westlake, I. p. 15, states custom and reason to be the sources of International Law. Why he does not recognise treaties as a source, I cannot understand, and I cannot agree to reason being a source. Reason is a means of interpreting law, but it cannot call law into existence.

into a custom. This question is one of fact, not of theory. All that theory can point out is this: Wherever and as soon as a certain frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary International Law.

Treaties as Source of International Law.

§ 18. Treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes,[1] it is necessary to emphasise that such treaties only are a source of International Law as either stipulate new rules for future international conduct or confirm, define, or abolish existing customary rules. Such treaties must be called *law-making treaties*. Since the Family of Nations is no organised body, there is no central authority which could make law for that body as Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is that the members of the Family of Nations conclude treaties in which certain rules for their future conduct are stipulated. Of course, such law-making treaties create law for the contracting parties solely. Their law is *universal* International Law only then, when all the members of the Family of Nations are parties to them. Many law-making treaties are concluded by a few States only, so that the law which they create is *particular* International Law. On the other hand, there have been many law-making treaties concluded which contain *general* International Law, because the majority of States, including leading Powers, are parties to them. General

[1] See below, § 492.

International Law has a tendency to become universal because such States as hitherto did not consent to it will in future either expressly give their consent or recognise the respective rules tacitly through custom.[1] But it must be emphasised that, whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations, that treaties are binding upon the contracting parties.[2]

Factors influencing the Growth of International Law.

§ 19. Thus custom and treaties are the two exclusive sources of the Law of Nations. When writers on International Law frequently enumerate other sources besides custom and treaties, they confound the term "source" with that of "cause" by calling sources of International Law such factors as influence the gradual growth of new rules of International Law without, however, being the historical facts out of which these rules receive their legal force. Important factors of this kind are: Opinions of famous writers on International Law, decisions of prize courts, arbitral awards, instructions issued by the different States for the guidance of their diplomatic and other organs, State Papers concerning foreign politics, certain Municipal Laws, decisions of Municipal Courts. All these and other factors may influence the growth of International Law either by creating usages which gradually turn into custom, or by inducing the members of the Family of Nations to conclude such treaties as stipulate legal rules for future international conduct.

A factor of a special kind which also influences the

[1] Law-making treaties of world-wide importance are enumerated below, §§ 556–568.

[2] See below, § 493.

growth of International Law is the so-called *Comity* (*Comitas Gentium*, *Convenance et Courtoisie Internationale*, *Staatengunst*). In their intercourse with one another, States do observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill. Such rules of international conduct are no rules of law, but of comity. The Comity of Nations is certainly not a source of International Law, as it is distinctly the contrast to the Law of Nations. But there can be no doubt that many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law. And it is certainly to be expected that this development will go on in future also, and that thereby many a rule of present International Comity will in future become one of International Law.

Comity of Nations.

IV

Relations between International and Municipal Law.

Holtzendorff in Holtzendorff, pp. 49–53, 117–120—Nys, I. pp. 185–189—Taylor, § 103—Holland, Studies, pp. 176–200—Kaufmann, "Die Rechtskraft des internationalen Rechts" (1899)—Triepel, "Völkerrecht und Landesrecht" (1899).

§ 20. The Law of Nations and the Municipal Law of the single States are essentially different from each other. They differ, first, as regards their sources. Sources of Municipal Law are custom grown up within the boundaries of the respective State and statutes enacted by the law-giving authority. Sources of International Law are custom grown up within the Family of Nations and law-making treaties concluded by the members of that family.

Essential Difference between International and Municipal Law.

The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of the respective State and the relations between this State and the respective individuals. International Law, on the other hand, regulates relations between the member States of the Family of Nations.

The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their law: whereas Municipal Law is a law of a Sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between Sovereign States, and therefore a weaker law.[1]

Law of Nations never *per se* Municipal Law.

§ 21. If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law. If, according to the Municipal Law of an individual State, the Law of Nations as a body or in parts is considered the law of the land, this can only be so either by municipal custom or by statute, and then the respective rules of the Law of Nations have by adoption[2] become at the same time rules of Municipal Law. Wherever and whenever such total or partial adoption has not taken place, municipal courts cannot be considered to be bound by International Law, because it has, *per se*, no power over municipal courts. And if it happens that a rule of Municipal Law is in an indubitable conflict with a rule

[1] See above, § 9.

[2] This has been done by the United States. See The Nereide, 9 Cranch, 388; United States *v.* Smith, 5 Wheaton, 153; The Scotia, 14 Wallace, 170; The Paquette Habana, 175 United States, 677. See also Taylor, § 103

of the Law of Nations, municipal courts must apply the former. If, on the other hand, a rule of the Law of Nations regulates a fact without conflicting with, but without expressly or tacitly being adopted by Municipal Law, municipal courts cannot apply such rule of the Law of Nations.

Certain Rules of Municipal Law necessitated or interdicted.

§ 22. If Municipal Courts cannot apply unadopted rules of the Law of Nations, and must apply even such rules of Municipal Law as conflict with the Law of Nations, it is evident that the different States, in order to fulfil their international obligations, must possess certain rules, and must not have certain other rules as part of their Municipal Law. It is not necessary to enumerate all the rules of Municipal Law which a State must possess, and all those rules it must not have. It suffices to give some illustrative examples. Thus, on the one hand, the Municipal Law of every State must, for instance, possess rules granting the necessary privileges to foreign diplomatic envoys, protecting the life and liberty of foreign citizens residing on its territory, threatening punishment for certain acts committed on its territory in violation of a foreign State. On the other hand, the Municipal Law of every State is prevented by the Law of Nations from having rules, for instance, conflicting with the freedom of the high seas, or prohibiting the innocent passage of foreign merchantmen through its maritime belt, or refusing justice to foreign residents with regard to injuries committed on its territory to their lives, liberty, and property by its own citizens. If a State does nevertheless possess such rules of Municipal Law as it is prevented from having by the Law of Nations, or if it does not possess such Municipal rules as it must have according to the Law of Nations, it violates an international

legal duty, but its courts cannot by themselves alter the Municipal Law to meet the requirements of the Law of Nations.

Presumption against conflicts between International and Municipal Law.

§ 23. However, although Municipal Courts must apply Municipal Law even if conflicting with the Law of Nations, there is a presumption against the existence of such a conflict. As the Law of Nations is based upon the common consent of the different States, it is improbable that a civilised State should intentionally enact a rule that conflicts with the Law of Nations. A part of Municipal Law, which ostensibly seems to conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as essentially not containing such conflict.

Presumption of Existence of certain necessary Municipal Rules.

§ 24. In case of a gap in the statutes of a civilised State regarding certain rules necessitated by the Law of Nations, such rules ought to be presumed by the Courts to have been tacitly adopted by such Municipal Law. It may be taken for granted that a State which is a member of the Family of Nations does not intentionally want its Municipal Law to be deficient in such rules. If, for instance, the Municipal Law of a State does not by a statute grant the necessary privileges to diplomatic envoys, the courts ought to presume that such privileges are tacitly granted.

Presumption of the Existence of certain Municipal Rules in Conformity with Rights granted by the Law of Nations.

§ 25. There is no doubt that a State need not make use of all the rights it has by the Law of Nations, and that, consequently, every State can by its laws expressly renounce the whole or partial use of such rights, provided always it is ready to fulfil such duties, if any, as are connected with these rights. However, when no such renunciation has taken place, Municipal Courts ought, in case the interests of justice demand it, to presume that their Sovereign has tacitly consented to make use of such rights.

If, for instance, the Municipal Law of a State does not by a statute extend its jurisdiction over its maritime belt, its courts ought to presume that, since by the Law of Nations the jurisdiction of a State does extend over its maritime belt, their Sovereign has tacitly consented to that wider range of its jurisdiction.

Case of the "Franconia."

A remarkable case illustrating this happened in this country in 1876. The German vessel "Franconia," while passing through the British maritime belt within three miles of Dover, negligently ran into the British vessel "Strathclyde," and sank her. As a passenger on board the latter was thereby drowned, the commander of the "Franconia," the German Keyn, was indicted at the Central Criminal Court and found guilty of manslaughter. The Court for Crown Cases Reserved, however, to which the Central Criminal Court referred the question of jurisdiction, held by a majority of one judge that, according to the law of the land, English courts had no jurisdiction over crimes committed in the English maritime belt. Keyn was therefore not punished.[1] To provide for future cases of such kind, Parliament passed, in 1878, the "Territorial Waters Jurisdiction Act."[2]

[1] L.R. 2 Ex. Div. 63. See Phillimore, I. § 198 B; Maine, pp. 39–45. See also below, § 189, where the controversy is discussed whether a riparian State has jurisdiction over foreign vessels that merely pass through its maritime belt.

[2] 41 and 42 Vict. c. 73.

V

Dominion of the Law of Nations

Lawrence, § 44—Phillimore, I. §§ 27-33—Twiss, I. § 62—Taylor, §§ 61-4—Westlake, I. p. 40—Bluntschli, §§ 1-16—Heffter, § 7—Holtzendorff in Holtzendorff, pp. 13-18—Nys, I. pp. 116-132—Rivier, I. § 1—Bonfils, Nos. 40-45—Martens, I. § 41.

Range of Dominion of International Law controversial.

§ 26. Dominion of the Law of Nations is the name given to the area within which International Law is applicable—that is, those States between which International Law finds validity. The range of the dominion of the Law of Nations is controversial, two extreme opinions concerning this dominion being opposed. Some publicists [1] maintain that the dominion of the Law of Nations extends as far as humanity itself, that every State, whether Christian or non-Christian, civilised or uncivilised, is a subject of International Law. On the other hand, several jurists [2] teach that the dominion of the Law of Nations extends only as far as Christian civilisation, and that Christian States only are subjects of International Law. Neither of these opinions would seem to be in conformity with the facts of the present international life and the basis of the Law of Nations. There is no doubt that the Law of Nations is a product of Christian civilisation. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries. And no constant intercourse existed in former times between Christian and Buddhistic States. But from about

[1] See, for instance, Bluntschli, § 8.
[2] See, for instance, Martens, § 41.

the beginning of the nineteenth century matters gradually changed. A condition of perpetual enmity between whole groups of nations exists no longer either in theory or in practice. And although there is still a broad and deep gulf between Christian civilisation and others, many interests, which knit Christian States together, knit likewise some non-Christian and Christian States.

Three Conditions of Membership of the Family of Nations

§ 27. Thus the membership of the Family of Nations has of late necessarily been increased and the range of the dominion of the Law of Nations has extended beyond its original limits. This extension has taken place in conformity with the basis of the Law of Nations. As this basis is the common consent of the civilised States, there are three conditions for the admission of new members into the circle of the Family of Nations. A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member.

The last two conditions are so obvious that they need no comment. Regarding the first condition, however, it must be emphasised that not particularly Christian civilisation, but civilisation of such kind only is conditioned as to enable the respective State and its subjects to understand and to act in conformity with the principles of the Law of Nations. These principles cannot be applied to a State which is not able to apply them on its own part to other States. On the other hand, they can well be applied

to a State which is able and willing to apply them to other States, provided a constant intercourse has grown up between it and other States. The fact is that the Christian States have been of late obliged by pressing circumstances to receive several non-Christian States into the community of States which are subjects of International Law.

Present Range of Dominion of the Law of Nations.

§ 28. The present range of the dominion of International Law is a product of historical development within which epochs are distinguishable marked by successive entrances ot various States into the Family of Nations.

(1) The old Christian States of Europe are the original members of the Family of Nations, because the Law of Nations grew up gradually between them through custom and treaties. It is for this reason that this law was in former times frequently called "European Law of Nations." But this name has nowadays historical value only, as it has been changed into "Law of Nations" or "International Law" pure and simple.

(2) The next group of States which entered into the Family of Nations is the body of Christian States which grew up outside Europe. All the American States which arose out of colonies of European States belong to this group. And it must be emphasised that the United States of America have largely contributed to the growth of the rules of International Law. The Christian Negro Republic of Liberia in West Africa and of Haiti on the island of San Domingo belong to this group.

(3) With the reception of the Turkish Empire into the Family of Nations International Law ceased to be a law between Christian States solely. This reception has expressly taken place through Article 7

of the Peace Treaty of Paris of 1856, in which the five Great European Powers of the time, namely, France, Austria, England, Prussia, and Russia, and besides those Sardinia, the nucleus of the future Great Power Italy, expressly "déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert européens." Since that time Turkey has on the whole endeavoured in time of peace and war to act in conformity with the rules of International Law, and she has, on the other hand, been treated accordingly by the Christian States. No general congress has taken place since 1856 to which Turkey was not invited to send her delegates.

(4) Another non-Christian member of the Family of Nations is Japan. Some years ago one might have doubted whether Japan was a real and full member of that family, but since the end of the nineteenth century no doubt is any longer justified. Through marvellous efforts, Japan has become not only a modern State, but an influential Power. Since her war with China in 1895, she must be considered one of the Great Powers that lead the Family of Nations.

(5) The position of such States as Persia, Siam, China, Korea, Abyssinia, and the like, is doubtful. These States are certainly civilised States, and Abyssinia is even a Christian State. However, their civilisation has not yet reached that condition which is necessary to enable their Governments and their population in every respect to understand and to carry out the command of the rules of International Law. On the other hand, international intercourse has widely arisen between these States and the States of the so-called Western civilisation. Many treaties have been concluded with them, and there

is full diplomatic intercourse between them and the Western States. All of them make efforts to educate their populations, to introduce modern institutions, and to raise thereby their civilisation to the level of the Western. They will certainly succeed in this regard in the near future. But as yet they have not accomplished this task, and consequently they are not yet able to be received as full members into the Family of Nations. Although they are, as will be shown below (§ 103), for some parts within the circle of the Family of Nations, they remain for other parts outside. But the example of Japan can show them that it depends entirely upon their own efforts to be received as full members into that family.

(6) It must be mentioned that a State of quite a unique character, the Congo Free State,[1] is, since the Berlin Conference of 1884, a member of the Family of Nations.

Treatment of States outside the Family of Nations.

§ 29. The Law of Nations as a law between States based on the common consent of the members of the Family of Nations naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous. Be that as it may, it is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family.

[1] See below, § 101.

VI

Codification of the Law of Nations

Holtzendorff in Holtzendorff, pp. 136–152—Ullmann, § 9—Despagnet, Nos. 67–68—Nys, I. pp. 166–183—Rivier, I. § 2—Fiore, I. Nos. 124–127—Martens, I. § 44—Holland, Studies, pp. 78–95—Bergbohm, "Staatsverträge und Gesetze als Quellen des Völkerrechts" (1877), pp. 44–77—Bulmerincq, "Praxis, Theorie, und Codification des Völkerrechts" (1874)—Roszkowski in R. I. XXI. (1889), p. 520.

Movement in Favour of Codification.

§ 30. The lack of precision which is natural to the majority of the rules of the Law of Nations on account of its slow and gradual growth has created a movement for its codification. The idea of a codification of the Law of Nations in its totality arose at the end of the eighteenth century. It was Bentham who first suggested such a codification. He did not, however, propose codification of the positive existing Law of Nations, but thought of a utopian International Law which could be the basis of an everlasting peace between the civilised States.[1]

Another utopian project is due to the French Convention, which resolved in 1792 to create a Declaration of the Rights of Nations as a pendant to the Declaration of the Rights of Mankind of 1789. For this purpose the Abbé Grégoire was charged with the drafting of such a declaration. In 1795, Abbé Grégoire produced a draft of twenty-one articles, which, however, were rejected by the Convention, and the matter dropped.[2]

It was not before 1861 that a real attempt was

[1] See Bentham's Works, ed. Bowring, VIII. p. 537; Nys, in The Law Quarterly Review, XI. (1885), p. 225.

[2] See Rivier, I. p. 40, where the full text of these twenty-one articles is given. They did not contain a real code, but certain principles only.

made to show the possibility of a codification. This was done by an Austrian jurist, Alfons von Domin-Petruchévecz, who published in that year at Leipzig a "Précis d'un Code de Droit International."

In 1862, the Russian Professor Katschenowsky brought an essay before the Juridical Society of London (Papers II. 1863) arguing the necessity of a codification of International Law.

In 1863, Professor Francis Lieber, of the Columbia College, New York, drafted the Laws of War in a body of rules which the United States published during the Civil War for the guidance of her army.[1]

In 1868, Bluntschli, the celebrated Swiss interpreter of the Law of Nations, published "Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt." This draft code has been translated into the French, Greek, Spanish, and Russian languages, and the Chinese Government produced an official Chinese translation as a guide for Chinese officials.

In 1872, the great Italian politician and jurist Mancini raised his voice in favour of codification of the Law of Nations in his able essay "Vocazione del nostro secolo per la riforma e codificazione del diritto delle genti."

Likewise in 1872 appeared at New York David Dudley Field's "Draft Outlines of an International Code."

In 1873 the Institute of International Law was founded at Ghent in Holland. This association of jurists of all nations meets periodically, and has produced a number of drafts concerning various parts of International Law, and in especial a Draft Code of the Law of War on Land (1880).

Likewise in 1873 was founded the Association for

[1] See below, Vol. II. § 68.

the Reform and Codification of the Law of Nations, which also meets periodically and which styles itself now The International Law Association.

In 1874 the Emperor Alexander II. of Russia took the initiative in assembling an international conference at Brussels for the purpose of discussing a draft code of the Law of Nations concerning land warfare. At this conference jurists, diplomatists, and military men were united as delegates of the invited States, and they agreed upon a body of sixty articles which goes under the name of the Declaration of Brussels. But the Powers have never ratified these articles.

In 1880 the Institute of International Law published its "Manuel des Lois de la Guerre sur Terre."

In 1890 the Italian jurist Fiore published his "Il diritto internazionale codificato e sua sanzione giuridica," of which a second edition appeared in 1898.

Work of the Hague Peace Conference

§ 31. At the end of the nineteenth century the so-called Peace Conference at the Hague, convened on the personal initiative of the Emperor Nicholas II. of Russia, has shown the possibility that parts of the Law of Nations may well be codified. Apart from three Declarations of minor value and of the Convention concerning the adaptation of the Geneva Convention to naval warfare, this conference has succeeded in producing two important conventions which may well be called codes—namely, first, the "Convention for the Pacific Settlement of International Disputes," and, secondly, the "Convention with respect to the Laws and Customs of War on Land." Whereas the future will still have to show whether the first-named convention will be of great practical importance, there can, on the other hand, not be denied the great practical value of the second-named convention. Although the latter

contains many gaps, which must be filled up by the customary Law of Nations, and although it is in no way a masterpiece of codification, it represents a model, the very existence of which teaches that codification of parts of the Law of Nations is practicable, provided the Powers are seriously inclined to come to an understanding. The Hague Peace Conference has therefore made an epoch in the history of International Law.

U.S. Naval War Code.

§ 32. Shortly after the Hague Peace Conference the United States of America took a step with regard to sea warfare similar to that taken by her in 1863 with regard to land warfare. She published on June 27, 1900, a body of rules for the use of her navy under the title "The Laws and Usages of War at Sea"—the so-called "United States Naval War Code." This code, which was drafted by Captain Charles H. Stockton, of the United States Navy, contains fifty-five articles which are divided into nine sections under the following titles:—"Hostilities;" "Belligerents;" "Belligerent and Neutral Vessels;" "Hospital Ships—the Shipwrecked, Sick, and Wounded;" "The Exercise of the Right of Search;" "Contraband of War;" "Blockade;" "The Sending in of Prizes;" "Armistice, Truce, and Capitulations, and Violations of Laws of War." I have no doubt that this American code will be the starting-point of a movement for a Naval War Code to be generally agreed upon by the Powers, similar to the Hague Regulations concerning land warfare.

Value of Codification of International

§ 33. In spite of the movement in favour of codification of the Law of Nations, there are many eminent jurists who oppose such codification. They argue that codification would never be possible on

account of differences of languages and of technical juridical terms. They assert that codification would cut off the organic growth and future development of International Law. They postulate the existence of a permanent International Court with power of executing its verdicts as an indispensable condition, since without such a court no uniform interpretation of controversial parts of a code could be possible. They, lastly, maintain that the Law of Nations is at present not yet, and will not be for a long time to come, ripe for codification. Those jurists, on the other hand, who are in favour of codification argue that the customary Law of Nations lacks to a great extent precision and certainty, that writers on International Law differ in many points regarding the latter's rules, and that, consequently, there is no broad and certain basis for the practice of the States to stand upon.

Law contested.

§ 34. I am decidedly not a blind and enthusiastic admirer of codification in general. It cannot be maintained that codification is everywhere, at all times, and under all circumstances opportune. Codification certainly interferes with the so-called organic growth of the law through usage into custom. It is true that a law, once codified, cannot so easily adapt itself to the merits of the individuality of single cases which come under it. It is further a fact, which cannot be denied, that together with codification there frequently enters into courts of justice and into the area of juridical literature a hair-splitting tendency and an interpretation of the law which clings often more to the letter and the word of the law than to its spirit and its principles. And it is not at all a fact that codification does away with controversies altogether. Codification certainly clears up many questions of law which have been

Merits of Codification in general.

hitherto debatable, but it creates at the same time new controversies. And, lastly, all jurists know very well that the art of legislation is still in its infancy and not at all highly developed. The hands of legislators are very often clumsy, and legislation does often more harm than good. Yet, on the other hand, the fact must be recognised that history has given its verdict in favour of codification. There is no civilised State in existence whose Municipal Law is not to a greater or lesser extent codified. The growth of the law through custom goes on very slowly and gradually, very often too slowly to be able to meet the demands of the interests at stake. New interests and new inventions very often spring up with which customary law cannot deal. Circumstances and conditions frequently change so suddenly that the ends of justice are not met by the existing customary law of a State. Thus, legislation, which is, of course, always partial codification, becomes often a necessity in the face of which all hesitation and scruple must vanish. Whatever may be the disadvantages of codification, there comes a time in the development of every civilised State when it can no longer be avoided. And great are the advantages of codification, especially of a codification that embraces a large part of the law. Many controversies are done away with. The science of Law receives a fresh stimulus. A more uniform spirit enters into the law of the country. New conditions and circumstances of life become legally recognised. Mortifying principles and branches are cut off with one stroke. A great deal of fresh and healthy blood is brought into the arteries of the body of the law in its totality. If codification is carefully planned and prepared, if it is imbued with true and healthy conservatism, many

disadvantages can be avoided. And interpretation on the part of good judges can deal with many a fault that codification has made. If the worst comes to the worst, there is always a Parliament or another law-giving authority of the land to mend through further legislation the faults of previous codification.

Merits of Codification of International Law.

§ 35. But do these arguments in favour of codification in general also apply to codification of the Law of Nations? I have no doubt that they do more or less. If some of these arguments have no force in view of the special circumstances of the existence of International Law and of the peculiarities of the Family of Nations, there are other arguments which take the place of the former.

When opponents maintain that codification would never be practicable on account of differences of languages and of technical juridical terms, I answer that such argument is only as much as and no more in the way of codification than it is in the way of contracting international treaties. The fact that such treaties are every day concluded shows that difficulties which arise out of differences of languages and of technical juridical terms are not at all insuperable.

Much more than this weighs the next argument of opponents, that codification of the Law of Nations would cut off the latter's organic growth and future development. It cannot be denied that codification always interferes with the growth of customary law, although the assertion is not justified that codification does *cut off* such growth. But this disadvantage can be met by periodical revisions of the code and by its gradual increase and improvement through enactment of additional and amending rules according to the wants and needs of the days to come.

When opponents postulate an international court with power of executing its verdicts as an indispensable condition of codification, I answer that the non-existence of such a court is quite as much or as little an argument against codification as against the very existence of International Law. If there is a Law of Nations in existence in spite of the non-existence of an international court to guarantee its realisation, I cannot see why the non-existence of such a court should be an obstacle to codifying the very same Law of Nations. It may indeed be maintained that codification is all the more necessary as such an international court does not exist. For codification of the Law of Nations and the solemn recognition of a code by a universal law-making international treaty would give more precision, certainty, and weight to the rules of the Law of Nations than they have now in their unwritten condition. And a uniform interpretation of a code is now, since the Hague Peace Conference has instituted a permanent Court of Arbitration, much more realisable than in former times, although this court has not and will never have the power of executing its verdicts.

But is the Law of Nations ripe for codification? I readily admit that there are certain parts of that law which would offer the greatest difficulty in codification, and which would therefore better remain untouched for the present. But there are other parts, and I think that they constitute the greater portion of the Law of Nations, which are certainly ripe for codification. There can be no doubt that, whatever can be said against codification of the totality of the Law of Nations, partial codification is possible and comparatively easy. The work done by the Institute of International Law, of which the

"Annuaire de l'Institut de Droit International" gives exhaustive evidence, affords a stepping-stone towards such partial codification.

How Codification could be realised.

§ 36. From the basis of this work of the Institute of International Law a partial codification of the Law of Nations must be considered practicable. Nevertheless, codification could hardly be realised at once. The difficulties, though not insuperable, are so great that it would take the work of perhaps a generation of able jurists to prepare draft codes for those parts of International Law which may be considered ripe for codification. The only feasible way in which such draft codes could be prepared consists in the appointment on the part of the Powers of an international committee composed of a sufficient number of able jurists, whose task would be the preparation of the drafts. Public opinion of the whole civilised world would, I am sure, watch the work of these men with the greatest anxiety, and the Parliaments of the civilised States would gladly vote the comparatively small sum of money necessary for the costs of the work. If a noble-minded monarch of far-reaching influence would take a personal interest in the matter, the different Governments would hardly refuse to send delegates to an international conference for the purpose of discussing the ways and means for the appointment of an international committee for the preparation of draft codes.

CHAPTER II

DEVELOPMENT AND SCIENCE OF THE LAW OF NATIONS

I

Development of the Law of Nations before Grotius

Lawrence, §§ 20–29—Manning, pp. 8–20—Halleck, I. pp. 1–11—Walker, History, I. pp. 30–137—Taylor, §§ 6–29—Holtzendorff in Holtzendorff, I. pp. 159–386—Nys, I. pp. 1–18—Martens, I. §§ 8–20—Fiore, I. Nos. 3–31—Calvo, I. pp. 1–32—Bonfils, Nos. 71–86—Despagnet, Nos. 1–19—Ward, "Enquiry into the Foundation and History of the Law of Nations," 2 vols. (1795)—Osenbrüggen, "De jure belli ac pacis Romanorum" (1876)—Müller-Jochmus, "Geschichte des Völkerrechts im Alterthum" (1848)—Hosack, "Rise and Growth of the Law of Nations" (1883), pp. 1–226—Nys, "Le droit de la guerre et les précurseurs de Grotius" (1882) and "Les origines du droit international" (1894).

No Law of Nations in antiquity.

§ 37. International Law as a law between Sovereign and equal States based on the common consent of these States is a product of modern Christian civilisation, and may be said to be hardly four hundred years old. However, the roots of this law go very far back into history. Such roots are to be found in the rules and usages which were observed by the different nations of antiquity with regard to their external relations. But it is well known that the conception of a Family of Nations did not arise in the mental horizon of the ancient world. Each nation had its own religion and gods, its own language, law, and morality. International interests of sufficient vigour to wind a band around all the civilised States, bring them nearer to each other, and

knit them together into a community of nations, did not spring up in antiquity. On the other hand, however, no nation could avoid coming into contact with other nations. War was waged and peace concluded. Treaties were agreed upon. Occasionally ambassadors were sent and received. International trade sprang up. Political men whose cause was lost often fled their country and took refuge in another. And, just as in our days, criminals often fled their country for the purpose of escaping punishment.

Such more or less frequent and constant contact of different nations with one another could not exist without giving rise to certain fairly congruent rules and usages to be observed with regard to external relations. These rules and usages were considered under the protection of the gods; their violation called for religious expiation. It is of interest to throw a glance upon the respective rules and usages of the Jews, Greeks, and Romans.

The Jews.

§ 38. Although they were monotheists and the standard of their ethics was consequently much higher than that of their heathen neighbours, the Jews did not in fact raise the standard of the international relations of their time except so far as they afforded foreigners living on Jewish territory equality before the law. Proud of their monotheism and despising all other nations on account of their polytheism, they found it totally impossible to recognise other nations as equals. If we compare the different parts of the Bible concerning the relations of the Jews with other nations, we are struck by the fact that the Jews were sworn enemies of some foreign nations, as the Amalekites, for example, with whom they declined to have any relations whatever in peace. When

they went to war with those nations, their practice was extremely cruel. They killed not only the warriors on the battlefield, but also the aged, the women, and the children in their homes. Read, for example, the short description of the war of the Jews against the Amalekites in 1 Samuel xv., where we are told that Samuel instructed King Saul as follows: (3) "Now go and smite Amalek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass." King Saul obeyed the injunction, save that he spared the life of Agag, the Amalekite king, and some of the finest animals. Then we are told that the prophet Samuel rebuked Saul and "hewed Agag in pieces with his own hand." Or again, in 2 Samuel xii. 31 we find that King David, "the man after God's own heart," after the conquest of the town Rabbah, belonging to the Ammonites, "brought forth the people that were therein and put them under saws, and under harrows of iron, and made them pass through the brick-kiln. . . ."

With those nations, however, of which they were not sworn enemies the Jews used to have international relations. And when they went to war with those nations, their practice was in no way exceptionally cruel, if looked upon from the standpoint of their time and surroundings. Thus we find in Deuteronomy xx. 10-14 the following rules:—

(10) "When thou comest nigh unto a city to fight against it, then proclaim peace unto it.

(11) "And it shall be, if it make thee answer of peace and open unto thee, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee.

(12) "And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it.

(13) "And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword.

(14) "But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee."

Comparatively mild, like these rules for warfare, were the Jewish rules as regards their foreign slaves. Such slaves were not without legal protection. The master who killed a slave was punished (Exodus ii. 20); if the master struck his slave so severely that he lost an eye or a tooth, the slave became a free man (Exodus ii. 26 and 27). The Jews, further, allowed foreigners to live among them under the full protection of their laws. "Love . . . the stranger, for ye were strangers in the land of Egypt," says Deuteronomy x. 19, and in Leviticus xxiv. 22 there is the command: "You shall have one manner of law, as well for the stranger as for one of your own country."

Of the greatest importance, however, for the International Law of the future, are the Messianic ideals and hopes of the Jews, as these Messianic ideals and hopes are not national only, but fully *inter*national. The following are the beautiful words in which the prophet Isaiah (ii. 2–4) foretells the state of mankind when the Messiah shall have appeared:

(2) "And it shall come to pass in the last days, that the mountain of the Lord's house shall be established in the top of the mountains, and shall be

exalted above the hills; and all nations shall flow unto it.

(3) "And many people shall go and say, Come ye, and let us go up to the mountain of the Lord, to the house of the God of Jacob, and he will teach us of his ways, and we will walk in his paths; for out of Zion shall go forth the law, and the word of the Lord from Jerusalem.

(4) "And he shall judge among the nations, and shall rebuke many people: and they shall beat their swords into plowshares, and their spears into pruning-hooks: nation shall not lift up sword against nation, neither shall they learn war any more."

Thus we see that the Jews, at least at the time of Isaiah, had a foreboding and presentiment of a future where all the nations of the world should be united in peace. And the Jews have left this ideal to the Christian world. It is the same ideal which has inspired in bygone times all those eminent men who have laboured to build up an International Law. And it is again the same ideal which inspires nowadays all lovers of international peace. Although the Jewish State and the Jews as a nation have practically done nothing to realise that ideal, yet it sprang up among them and has never disappeared.

The Greeks.

§ 39. Totally different from this Jewish contribution to a future International Law is that of the Greeks. The broad and deep gulf between their civilisation and that of their neighbours necessarily made them look down upon these neighbours as barbarians, and thus prevented them from raising the standard of their relations with neighbouring nations above the average level of antiquity. But the Greeks were before the Macedonian conquest never united into one powerful national State. They

lived in numerous more or less small city States, which were totally independent of one another. It is this very fact which, as time went on, called into existence a kind of International Law between these independent States. They could never forget that their inhabitants were of the same race. The same blood, the same religion, and the same civilisation of their citizens united these independent and—as we should nowadays say—Sovereign States into a community of States which in time of peace and war held themselves bound to observe certain rules as regards the relations between one another. The consequence was that the war practice of the Greeks in their wars among themselves was a very mild one. It was a rule that war should never be commenced without a declaration of war. Heralds were inviolable. Warriors who died on the battlefield were entitled to burial. If a city was captured, the lives of all those who took refuge in a temple had to be spared. War prisoners could be exchanged or ransomed; their lot was, at the utmost, slavery. Certain places, as for example the temple of the god Apollo at Delphi, were permanently inviolable. Even certain persons in the armies of the belligerents were considered inviolable, as the priests, for instance, who carried the holy fire, and the seers.

Thus the Greeks left the example to history that independent and sovereign States can live, and are at the same time obliged to live, in a community which provides a law for the international relations of the member States, provided that there exist some common interests and aims which bind these States together. It is very often maintained that this kind of International Law of the Greek States could in no way be compared with our modern Inter-

national Law, as the Greeks did not consider their international rules as legally, but as religiously binding only. We must, however, not forget that the Greeks never made the same distinction between law, religion, and morality as the modern world makes. The fact itself remains unshaken that the Greek States have set an example to the future that independent States can live in a community in which their international regulations are governed by certain rules and customs based on the common consent of the members of that community.

The Romans.

§ 40. Totally different again from the Greek contribution to a future International Law is that of the Romans. As far back as their history goes, the Romans had a special set of twenty priests, the so-called *fetiales*, for the management of functions regarding their relations with foreign nations. In fulfilling their functions the *fetiales* did not apply a purely secular but a divine and holy law, a *jus sacrale*, the so-called *jus fetiale*. The *fetiales* were employed when war was declared or peace was made, when treaties of friendship or of alliance were concluded, when the Romans had an international claim before a foreign State, or *vice versa*.

According to Roman Law the relations of the Romans with a foreign State depended upon the fact whether or not there existed a treaty of friendship between Rome and the respective State. In case such a treaty was not in existence, persons or goods coming from the foreign land into the land of the Romans, and likewise persons and goods coming from the land of the Romans into the foreign land, enjoyed no legal protection whatever. Such persons could be made slaves, and such goods could be seized and became the property of the captor. Should such an enslaved

person ever come back to his country, he was at once considered a free man again according to the so-called *jus postliminii*. An exception was made as regards the ambassadors. They were always considered inviolable, and whoever violated them was handed over to the home State of those ambassadors to be punished according to discretion.

Different were the relations when a treaty of friendship existed. Persons and goods coming from one country into the other stood then under legal protection. So many foreigners came in the process of time to Rome that a whole system of law sprang up regarding these foreigners and their relations with Roman citizens, the so-called *jus gentium* in contradistinction to the *jus civile*. And a special magistrate, the *praetor peregrinus*, was nominated for the administration of that law. Of such treaties with foreign nations there were three different kinds, namely, of *friendship* (*amicitia*), of *hospitality* (*hospitium*), or of *alliance* (*foedus*). I do not propose to go into details about them. It suffices to remark that, although the treaties were concluded without any such provision, notice of termination could be given. Very often these treaties used to contain a provision according to which future controversies could be settled by arbitration of the so-called *recuperatores*.

Very precise legal rules existed as regards war and peace. Roman law considered war a legal institution. There were four different just reasons for war, namely: (1) Violation of the Roman dominion; (2) violation of ambassadors; (3) violation of treaties; (4) support given during war to an opponent by a hitherto friendly State. But even in such cases war was only justified if satisfaction was not given by the Foreign State. Four *fetiales* used to be sent as

ambassadors to the foreign State who asked for satisfaction. If such satisfaction was refused, war was formally declared by throwing a lance from the Roman frontier into the foreign land by one of the *fetiales*. For warfare itself no legal rules existed, but discretion only, and there are examples enough of great cruelty on the part of the Romans. Legal rules existed again for the end of war. War could be ended, first, through a treaty of peace, which was then always a treaty of friendship. War could, secondly, be ended by surrender (*deditio*). Such surrender spared the enemy their lives and property. War could, thirdly and lastly, be ended through conquest of the enemy's country (*occupatio*). It was in this case that the Romans could act according to discretion with the lives and the property of the enemy.

From this sketch of their rules concerning external relations, it becomes apparent that the Romans gave to the future the example of a State with *legal* rules for its foreign relations. As the legal people *par excellence*, the Romans could not leave their international relations without legal treatment. And though this legal treatment can in no way be compared to the modern International Law, yet it constitutes a contribution to the Law of Nations of the future, in so far as its example furnished many arguments to those to whose efforts we owe the very existence of our modern Law of Nations.

No need for a Law of Nations during the Middle Ages.

§ 41. The Roman Empire gradually absorbed the whole civilised ancient world, so far as it was known to the Romans. They did not know of any independent civilised States outside the borders of their empire. There was, therefore, neither room nor need for an International Law as long as this empire

existed. It is true that at the borders of this world-empire there were always wars with barbarous tribes, but these wars gave opportunity for the practice of a few rules and usages only. And matters did not change when under Constantine the Great (313–337) the Christian faith became the religion of the empire and Byzantium its capital instead of Rome, and, further, when in 395 the Roman Empire was divided into the Eastern and the Western Empire. This Western Empire disappeared in 476, when Romulus Augustus, the last emperor, was deposed by Odoacer, the leader of the Germanic soldiers, who made himself ruler in Italy. The land of the extinct Western Roman Empire came into the hands of different peoples, chiefly of Germanic extraction. In Gallia the kingdom of the Francs springs up in 486 under Chlodovech the Merovingian. In Italy, the kingdom of the Ostrogoths under Theoderich the Great, who defeated Odoacer, rises in 493. In Spain the kingdom of the Visigoths appears in 507. The Vandals had, as early as in 429, erected a kingdom in Africa, with Carthage as its capital. The Saxons had gained a footing in Britannia already in 449.

All these peoples were barbarians in the strict sense of the term. Although they had adopted Christianity, it took hundreds of years to raise them up to the standard of a more advanced civilisation. And likewise hundreds of years passed before different nations came to light out of the amalgamation of the various peoples that had conquered the old Roman Empire with the residuum of the population of that empire. It was in the eighth century that matters became more settled. Charlemagne built up his vast Frankish Empire, and was, in 800, crowned Roman Emperor by Pope Leo III. Again the whole

world seemed to be one empire, headed by the Emperor as its temporal, and by the Pope as its spiritual master, and for an International Law there was therefore no room and no need. But the Frankish Empire did not last long. According to the Treaty of Verdun, it was, in 843, divided into three parts, and with that division the process of development set in, which led gradually to the rise of the different States of Europe.

In theory the Emperor of the Germans remained for hundreds of years to come the master of the world, but in practice he was even not master at home, as the German Princes step by step succeeded in establishing their independence. And although theoretically the world was well looked after by the Emperor as its temporal and the Pope as its spiritual head, there were constantly treachery, quarrelling, and fighting going on. War practice was the most cruel possible. It is true that the Pope and the Bishops succeeded sometimes in mitigating such practice, but as a rule there was no influence of the Christian teaching visible.

The Fifteenth and Sixteenth Century.

§ 42. The necessity for a Law of Nations did not arise until a multitude of States absolutely independent of one another had successfully established themselves. The process of development, starting from the Treaty of Verdun of 843, reached that climax with the reign of Frederic III., Emperor of the Germans from 1440 to 1493. He was the last of the emperors crowned in Rome by the hands of the Popes. At that time Europe was in fact divided up into a great number of independent States, and thenceforth a law was needed to deal with the international relations of these Sovereign States. Six factors of importance prepared the ground for

the growth of principles of a future International Law.

(1) There were first the Civilians and the Canonists. Roman Law was in the beginning of the twelfth century brought back to the West through Irnerius, who taught this law at Bologna. He and the other *glossatores* and *post-glossatores* considered Roman Law the *ratio scripta*, *the* law *par excellence*. These Civilians maintained that Roman Law was the law of the civilised world *ipso facto* through the emperors of the Germans being the successors of the emperors of Rome. Their commentaries to the *Corpus Juris Civilis* touch upon many questions of the future International Law which they discuss from the basis of Roman Law.

The Canonists, on the other hand, whose influence was unshaken till the time of the Reformation, treated from a moral and ecclesiastical point of view many questions of the future International Law concerning war.[1]

(2) There were, secondly, collections of Maritime Law of great importance which made their appearance in connection with international trade. From the eighth century the world trade which had totally disappeared in consequence of the downfall of the Roman Empire and the destruction of the old civilisation during the period of the Migration of the Peoples, began slowly to develop again. The sea trade specially flourished and fostered the growth of rules and customs of Maritime Law, which were collected into codes and gained some kind of international recognition. The more important of these collections are the following: The *Consolato del Mare*, a private collection made at Barcelona in Spain

[1] See Holland, Studies, pp. 40–58; Walker, History, I. pp. 204–212.

in the middle of the fourteenth century; the *Laws of Oléron*, a collection, made in the twelfth century, of decisions given by the maritime court of Oléron in France; the *Rhodian Laws*, a very old collection of maritime laws which partly date back as far as the eighth century; the *Tabula Amalfitana*, the maritime laws of the town of Amalfi in Italy, which date at latest from the tenth century; the *Leges Wisbuenses*, a collection of maritime laws of Wisby on the island of Gothland, in Sweden, dating from the fourteenth century.

The growth of international trade caused also the rise of the controversy regarding the freedom of the high seas (see below, § 248), which indirectly influenced the growth of an International Law (see below, §§ 248–250).

(3) A third factor was the numerous leagues of trading towns for the protection of their trade and trading citizens. The most celebrated of these leagues is the Hanseatic, formed in the thirteenth century. These leagues stipulated for arbitration on controversies between their member-towns. They acquired trading privileges in foreign States. They even waged war, when necessary, for the protection of their interests.

(4) A fourth factor was the growing custom on the part of the States of sending and receiving permanent legations. In the Middle Ages the Pope alone had a permanent legation at the court of the Frankish kings. Later on, the Italian Republics, as Venice and Florence for instance, were the first States to send out ambassadors, who took their residence for several years in the capitals of the States they were sent to. At last, from the end of the fifteenth century, it became a universal custom that the

kings of the different States kept permanent legations at one another's capital. The consequence was that an uninterrupted opportunity was given for discussing and deliberating common international interests. And since the position of the ambassadors in foreign countries had to be taken into consideration, international rules as regards such position grew gradually up.

(5) A fifth factor was the custom of the great States of keeping standing armies, a custom which dates from the fifteenth century also. The uniform and stern discipline in these armies favoured the rise of more universal rules and practices of warfare.

(6) A sixth factor was the Renaissance and the Reformation. The Renaissance of science and art in the fifteenth century, together with the resurrection of the knowledge of antiquity, revived the philosophical and aesthetical ideals of Greek life and transferred them to modern life. Through their influence the spirit of the Christian religion took precedence of its letter. The conviction awoke everywhere that the principles of Christianity ought to unite the Christian world more than they had done hitherto, and that these principles ought to be observed in matters international as much as in matters national. The Reformation, on the other hand, made an end to the spiritual mastership of the Pope over the civilised world. Protestant States could not recognise the claim of the Pope to arbitrate as of right in their conflicts either between one another or between themselves and Catholic States.

II

Development of the Law of Nations after Grotius

Lawrence, §§ 29-53—Halleck, I. pp. 12-45—Walker, History, I. pp. 138-202—Taylor, §§ 65-95—Nys, I. pp. 19-46—Martens, I. §§ 21-33—Fiore, I. Nos. 32-52—Calvo, I. pp. 32-101—Bonfils, Nos. 87-146—Despagnet, Nos. 20-27—Wheaton, "Histoire des progrès du droit des gens en Europe" (1841)—Pierantoni, "Storia del diritto internazionale nel secolo XIX." (1876)—Hosack, "Rise and Growth of the Law of Nations" (1883), pp. 227-320—Brie, "Die Fortschritte des Völkerrechts seit dem Wiener Congress" (1890).

The time of Grotius.

§ 43. The seventeenth century found a multitude of independent States established and crowded on the comparatively small continent of Europe. Many interests and aims knitted these States together into a community of States. International lawlessness was henceforth an impossibility. This was the reason for the fact that Grotius's work "De Jure Belli ac Pacis libri III.," which appeared in 1625, won the ear of the different States, their rulers, and their writers on matters international. Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied a legal basis to most of those international relations which were at the time considered as wanting such basis, the book of Grotius obtained such a world-wide influence that he is correctly styled the "Father of the Law of Nations." It would be very misleading and in no way congruent with the facts of history to believe that Grotius's doctrines were as a body at once universally accepted. No such thing happened, nor could have happened. What did soon take place was that whenever an international question of legal

importance arose, Grotius's book was consulted, and its authority was so overwhelming that in many cases its rules were considered right. How those rules of Grotius, which have more or less quickly been recognised by the common consent of the writers on International Law, have gradually received similar acceptance at the hands of the Family of Nations is a process of development which in each single phase cannot be ascertained. It can only be stated that at the end of the seventeenth century the civilised States consider themselves bound by a Law of Nations the rules of which were to a great extent the rules of Grotius. This does not mean that these rules have from the end of that century never been broken. On the contrary, they have frequently been broken. But whenever this occurred, the States concerned maintained either that they did not intend to break these rules, or that their acts were in harmony with them, or that they were justified by just causes and circumstances in breaking them. And the development of the Law of Nations did not come to a standstill with the reception of the bulk of the rules of Grotius. More and more rules were gradually required and therefore gradually grew. All the historical important events and facts of international life from the time of Grotius down to our own have, on the one hand, given occasion to the manifestation of the existence of a Law of Nations, and, on the other hand, in their turn made the Law of Nations constantly and gradually develop into a more perfect and more complete system of legal rules.

It serves my purpose to divide the history of the development of the Law of Nations from the time of Grotius into six periods—namely, 1648–1721,

1721–1789, 1789–1815, 1815–1856, 1856–1874, 1874–1899.

The period 1648–1721.

§ 44. The ending of the Thirty Years' War through the Westphalian Peace of 1648 is the first event of great importance after the death of Grotius in 1645. What makes remarkable the meetings of Osnaburg, where the Protestant Powers met, and Münster, where the Catholic Powers met, is the fact that there was for the first time in history a European Congress assembled for the purpose of settling matters international by common consent of the Powers. With the exception of England, Russia, and Poland, all the important Christian States were represented at this congress, as were also the majority of the minor Powers. The arrangements made by this congress show what a great change had taken place in the condition of matters international. The Swiss Confederation and the Netherlands were recognised as Independent States. The 355 different States which belonged to the German Empire were practically, although not theroetically, recognised as independent States which formed a Confederation under the Emperor as its head. Of these 355 States, 150 were secular States governed by hereditary monarchs (Electors, Dukes, Landgraves, and the like), 62 were free-city States, and 123 were ecclesiastical States governed by archbishops and other Church dignitaries. The theory of the unity of the civilised world under the German Emperor and the Pope as its temporal and spiritual heads was buried for ever. A multitude of recognised independent States formed now a community on the basis of equality of all its members. The conception of the European equilibrium made its appearance and became an implicit principle as a guaranty for the independence of

the members of the Family of Nations. Protestant States took up their position within this family along with Catholic States, as did republics along with monarchies.

In the second half of the seventeenth century the policy of conquest initiated by Louis XIV. of France led to numerous wars. But Louis XIV. always pleaded a just cause when he made war, and even the establishment of the ill-famed so-called Chambers of Reunion (1680–1683) was done under the pretext of law. There was no period later in history in which the principles of International Law were more frivolously violated, but the violation was always cloaked by some excuse. Five treaties of peace between France and other Powers during the reign of Louis XIV. are of great importance. (1) The Peace of the Pyrenees, which ended in 1659 the war between France and Spain, which had not come to terms at the Westphalian Peace. (2) The Peace of Aix-la-Chapelle, which ended in 1668 another war between France and Spain, commenced in 1667 because France claimed the Spanish Netherlands from Spain. This peace was forced upon Louis XIV. through the triple alliance between England, Holland, and Sweden. (3) The Peace of Nymeguen, which ended in 1678 the war originally commenced by Louis XIV. in 1672 against Holland, into which, however, many other European Powers were dragged. (4) The Peace of Ryswick, which ended in 1697 the war that existed since 1688 between France on one side, and, on the other, England, Holland, Denmark, Germany, Spain, and Savoy. (5) The Peace of Utrecht and the Peace of Rastadt and Baden, which in 1713 and 1714 respectively ended the war of the Spanish Succession since 1701 between France and Spain on the one

side, and, on the other, England, Holland, Portugal, Germany, and Savoy.

But wars were not only waged between France and other Powers during this period. The following treaties of peace must therefore be mentioned:—(1) The Peaces of Roeskild (1658), Oliva (1660), Copenhagen (also 1660), and Kardis (1661). The contracting Powers were Sweden, Denmark, Poland, Prussia, and Russia. (2) The Peace of Carlowitz of 1699, between Turkey, Austria, Poland, and Venice. (3) The Peace of Nystaedt, between Sweden and Russia under Peter the Great in 1721.

The year 1721 is epoch-making because with the Peace of Nystaedt Russia enters as a member into the Family of Nations, in which she at once held the position of a Great Power. The period ended by the year 1721 shows in many points progressive tendencies regarding the Law of Nations. Thus the right of visit and search on the part of belligerents over neutral vessels becomes recognised. The rule "free ship, free goods," rises as a postulate, although it was not universally recognised till 1856. The freedom of the high seas, claimed by Grotius and others, begins gradually to obtain recognition in practice, although here too it did not meet with universal acceptance till the nineteenth century. The balance of power is solemnly recognised by the Peace of Utrecht as a principle of the Law of Nations.

The period 1721–1789.

§ 45. Before the end of the first half of the eighteenth century peace in Europe was again disturbed. The rivalry between Austria and Prussia, which had become a kingdom in 1701 and where Frederick the Great had ascended the throne in 1740, led to several wars in which England, France, Spain,

Bavaria, Saxony, and Holland took part. Several treaties of peace were successively concluded which tried to keep up or re-establish the balance of power in Europe. The most important of these treaties are: (1) The Peace of Aix-la-Chapelle of 1748 between France, England, Holland, Austria, Prussia, Sardinia, Spain, and Genoa. (2) The Peace of Hubertsburg and the Peace of Paris, both of 1763, the former between Prussia, Austria, and Saxony, the latter between England, France, and Spain. (3) The Peace of Versailles of 1783 between England, the United States of America, France, and Spain.

These wars gave occasion to disputes as to the right of neutrals and belligerents regarding trade in time of war. Prussia became a Great Power. The so-called First Armed Neutrality[1] made its appearance in 1780 with claims of great importance, which were not generally recognised till 1856. The United States of America succeeded in establishing her independence and became a member of the Family of Nations, whose future attitude fostered the growth of several rules of International Law.

The period 1789–1815.

§ 46. All progress, however, was endangered, and indeed the Law of Nations seemed partly non-existent, during the time of the French Revolution and the Napoleonic wars. Although the French Convention resolved in 1792 (as stated above, § 30) to create a "Declaration of the Rights of Nations," the Revolutionary Government and afterwards Napoleon I. very often showed no respect for the rules of the Law of Nations. The whole order of Europe, which had been built up by the Westphalian and subsequent treaties of peace for the purpose of maintaining a

[1] See below, Vol. II. §§ 289 and 290, where details concerning the first and second armed neutrality are given.

balance of power, was overthrown. Napoleon I. was for some time the master of Europe, Russia and England excepted. He arbitrarily created States and suppressed them again. He divided existing States into portions and united separate States. The kings depended upon his goodwill, and they had to follow orders when he commanded. Especially as regards Maritime International Law, a condition of partial lawlessness arose during this period. Already in 1793 England and Russia interdicted all navigation with the ports of France, with the intention to subdue her by famine. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to the ports of the enemy or carrying enemy goods. And again Napoleon, who wanted to ruin England by destroying her commerce, announced in 1806 in his Berlin Decrees the boycott of all English goods. England answered with the blockade of all French ports and all ports of the allies of France, and ordered her fleet to capture all ships destined to any such port.

When at last the whole of Europe was mobilised against Napoleon and he was finally defeated, the whole face of Europe was changed, and the former order of things could not possibly be restored. It was the task of the European Congress of Vienna in 1814 and 1815 to create a new order and a fresh balance of power. This new order comprised chiefly the following arrangements: The Prussian and the Austrian monarchies were re-established, as was also the Germanic Confederation, which consisted henceforth of thirty-nine member States. A kingdom of the Netherlands was created out of Holland and Belgium. Norway and Sweden became a Real Union. The old dynasties were restored in Spain, in Sardinia,

in Tuscany, and in Modena, as was also the Pope in Rome. To the nineteen cantons of the Swiss Confederation were added those of Geneva, Valais, and Neuchatel, and this Confederation was neutralised for all the future. But the Vienna Congress did not only establish a new political order in Europe, it also settled some questions of International Law. Thus, free navigation was agreed to on the so-called international rivers, which are rivers running through the land of different States. It was further arranged that henceforth the diplomatic agents should be divided into three classes (Ambassadors, Ministers, Chargés d'Affaires). Lastly, a universal prohibition of the trade with negro slaves was agreed upon.

The period 1815–1856.

§ 47. The period after the Vienna Congress begins with the so-called Holy Alliance. Already on September 26, 1815, before the second Peace of Paris, the Emperors of Russia and Austria and the King of Prussia called this alliance into existence, the object of which was to make it a duty upon its members to apply the principles of Christian morality in the administration of the home affairs of their States as well as in the conduct of their international relations. After the Vienna Congress the sovereigns of almost all the European States had joined that alliance with the exception of England. George IV., at that time prince-regent only, did not join, because the Holy Alliance was an alliance not of the States, but of sovereigns, and therefore was concluded without the signatures of the respective responsible Ministers, whereas according to the English Constitution the signature of such a responsible Minister would have been necessary.

The Holy Alliance had not as such an importance for International Law, for it was a religious, moral,

and political, but scarcely a legal alliance. But at the Congress of Aix-la-Chapelle in 1818, where the Emperors of Russia and Austria and the King of Prussia attended in person, and where it might be said that the principles of the Holy Alliance were practically applied, the Great Powers signed a Declaration,[1] in which they solemnly recognised the Law of Nations as the basis of the international relations, and in which they pledged themselves for all the future to act according to its rules. The leading principle of their politics was that of legitimacy, as they endeavoured to preserve everywhere the old dynasties and to protect the sovereigns of the different countries against revolutionary movements of their subjects. This led in fact to a dangerous neglect of the principles of International Law regarding intervention. The Great Powers, with the exception of England, intervened constantly with the domestic affairs of the minor States in the interest of the legitimate dynasties and of an anti-liberal legislation. The Congresses at Troppau 1820, Laibach 1821, Verona 1822, occupied themselves with a deliberation on such interventions.

The famous Monroe Doctrine (see below, § 139) owes its origin to that dangerous policy of the European Powers as regards intervention, although this doctrine embraces other points besides intervention. As after the Vienna Congress a number of Spanish colonies in South America had fallen off from the mother country and declared their independence, and as Spain thought of reconquering these States with the help of other Powers who upheld the principle of legitimacy, President Monroe delivered his message on December 2, 1823, which pointed out

[1] See Martens, N. R. IV. p. 560.

amongst other things, that the United States could not allow the interference of a European Power with the States of the American continent.

Different from the intervention of the Powers of the Holy Alliance in the interest of legitimacy were the two interventions in the interest of Greece and Belgium. England, France, and Russia intervened in 1827 in the struggle of Turkey with the Greeks, an intervention which led finally in 1830 to the independence of Greece. And the Great Powers of the time, namely, England, Austria, France, Prussia, and Russia, invited by the provisional Belgian Government, intervened in 1830 in the struggle of the Dutch with the Belgians and secured the formation of a separate Kingdom of Belgium.

It may be maintained that the establishment of Greece and Belgium inferred the breakdown of the Holy Alliance. But it was not till the year 1848 that this alliance was totally swept away through the disappearance of absolutism and the victory of the constitutional system in most States of Europe. Since, shortly afterwards, in 1852, Napoleon III. became Emperor of France, who adopted the principle of nationality and exercised a preponderant influence in Europe, one may say that this principle of nationality superseded in European politics the principle of legitimacy.

The last event of this period is the Crimean War, which led to the Peace as well as to the Declaration of Paris in 1856. This war broke out in 1853 between Russia and Turkey. In 1854, England, France, and Sardinia joined Turkey, but the war continued nevertheless for another two years. Finally, however, Russia was defeated, a Congress assembled at Paris, where England, France, Austria, Russia, Sardinia,

Turkey, and eventually Prussia were represented, and peace was concluded in March 1856. In the Peace Treaty, Turkey is expressly received as a member into the Family of Nations. Of greater importance, however, is the celebrated Declaration of Paris regarding maritime International Law which was signed on April 16, 1856, by the delegates of the Powers that had taken part in the Congress. This declaration abolished privateering, recognised the rules that enemy goods on neutral vessels and that neutral goods on enemy vessels cannot be confiscated, and stipulated that a blockade in order to be binding must be effective. Together with the fact that at the end of the first quarter of the nineteenth century the principle of the freedom of the high seas[1] became universally recognised, the Declaration of Paris is a prominent landmark of the progress of the Law of Nations. The Powers that had not been represented at the Congress of Paris were invited to sign the Declaration afterwards, and the majority of the members of the Family of Nations did sign it before the end of the year 1856. The few States, such as the United States of America, Spain, Mexico, and others, which have not signed,[2] have in practice since 1856 not acted in opposition to the Declaration, and one may therefore, perhaps, maintain that the Declaration of Paris has already become or will soon become universal International Law through custom.

The period 1856–1874.

§ 48. The next period, the time from 1856 to 1874, is of prominent importance for the development of

[1] See below, § 251.

[2] Japan signed in 1886. It should be mentioned that the United States did not sign the Declaration of Paris because it did not go far enough, and did not interdict capture of private enemy vessels.

the Law of Nations. Under the aegis of the principle of nationality, Austria turns in 1867 into the dual monarchy of Austria-Hungary, and Italy as well as Germany becomes united. The unity of Italy rises out of the war of France and Sardinia against Austria in 1859, and Italy ranges henceforth among the Great Powers of Europe. The unity of Germany is the combined result of three wars: that of Austria and Prussia in 1864 against Denmark on account of Schleswig-Holstein, that of Prussia and Italy against Austria in 1866, and that of Prussia and the allied South German States against France in 1870. The defeat of France in 1870 had the consequence that Italy took possession of the Papal States, whereby the Pope disappeared from the number of governing sovereigns.

The United States of America rise through the successful termination of the Civil War in 1865 to the position of a Great Power. Several rules of maritime International Law owe their further development to this war. And the instructions concerning warfare on land, published in 1863 by the Government of the United States, represent the first step towards codification of the Laws of War. In 1864, the Geneva Convention for the amelioration of the condition of soldiers wounded in armies in the field is, on the initiation of Switzerland, concluded by nine States, and in time almost all civilised States became parties to it. In 1868, the Declaration of St. Petersburg, interdicting the employment in war of explosive balls below a certain weight, is signed by many States. In 1871, the Conference of London, attended by the representatives of the Powers which were parties to the Peace of Paris of 1856, solemnly proclaims "that it is an essential principle of the

Law of Nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement." The last event in this period is the Conference of Brussels of 1874 for the codification of the rules and usages of war on land. Although the signed code was never ratified, the Brussels Conference was nevertheless epoch-making, since it showed the readiness of the Powers to come to an understanding regarding such a code.

The period 1874–1899.

§ 49. After 1874 the principle of nationality continues to exercise its influence as before. Under its aegis takes place the partial decay of the Ottoman Empire. The refusal of Turkey to introduce reforms regarding the Balkan population led in 1877 to war between Turkey and Russia, which was ended in 1878 by the peace of San Stefano. As the conditions of this treaty would practically have done away with Turkey in Europe, England intervened and a European Congress assembled at Berlin in June 1878 which modified materially the conditions of the Peace of San Stefano. The chief results of the Berlin Congress are :—(1) Servia, Roumania, Montenegro become independent and sovereign States; (2) Bulgaria becomes an independent principality under Turkish suzerainty; (3) the Turkish provinces of Bosnia and Herzegovina come under the administration of Austria-Hungary; (4) a new province under the name of Eastern Rumelia is created in Turkey and is to enjoy great local autonomy (according to an arrangement of the Conference of Constantinople in 1885–1886 a bond is created between Eastern Rumelia and Bulgaria by appointing the Prince of Bulgaria governor of Eastern Rumelia); (5) free

navigation on the Danube from the Iron Gates to its mouth in the Black Sea is proclaimed.

In 1897 Crete revolted against Turkey, war broke out between Greece and Turkey, the Powers interfered, and peace was concluded at Constantinople. Crete becomes an autonomous half-Sovereign State under Turkish suzerainty and under Prince George of Greece as governor.

In the Far East war breaks out in 1895 between China and Japan, in which China is defeated and out of which Japan rises as a Great Power. That she must now be considered a full member of the Family of Nations becomes apparent from the treaties concluded by her with other Powers for the purpose of abolishing their consular jurisdiction within the boundaries of Japan.

In America the United States intervene in 1898 in the revolt of Cuba against the motherland, whereby war breaks out between Spain and the United States. The defeat of Spain secures the independence of Cuba through the Peace of Paris of 1898.

An event of great importance during this period is the Congo Conference of Berlin, which took place in 1884–1885, and at which were represented England, Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States of America, France, Italy, Holland, Portugal, Russia, Sweden-Norway, Turkey. This conference stipulated freedom of commerce, interdiction of slave-trade, and neutralisation of the territories in the Congo district, and secured freedom of navigation on the rivers Congo and Niger. The so-called Congo Free State was recognised as a member of the Family of Nations.

A second fact of great importance is the establishment of numerous international unions with special

international offices for various non-political purposes. A Universal Telegraphic Union was established in 1875, a Universal Postal Union in 1878, a Union for the Protection of Industrial Property in 1883, a Union for the Protection of Works of Literature and Art in 1886, a Union for the Publication of Custom Tariffs in 1890.

A third fact of great importance is that in this period a tendency has arisen to settle international conflicts more frequently than in former times by arbitration. Numerous arbitrations have actually taken place, and several treaties have been concluded between different States stipulating the settlement by arbitration of all conflicts which would arise in future between the contracting parties.

The last fact of great importance which is epoch-making for this period is the Peace Conference of the Hague of 1899. This Conference produced, apart from three Declarations of minor importance, a Convention for the Pacific Settlement of International Conflicts, a Convention regarding the Laws and Customs of War on Land, and a Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. It also formulated, among others, the three wishes (1) that a conference should in the near future regulate the rights and duties of neutrals, (2) that a future conference should contemplate the declaration of the inviolability of private property in naval warfare, (3) that a future conference should settle the question of the bombardment of ports, towns, and villages by naval forces.

The Twentieth Century.

§ 50. Soon after the Hague Peace Conference, in October 1899, war breaks out in South Africa between Great Britain and the two Boer Republics, which leads to the latter's annexation at the end of

1901. The assassination of the German Ambassador and the general attack on the European legations in Peking in 1900 lead to a united action of the Powers against China for the purpose of vindicating this violation of the fundamental rules of the Law of Nations. In December 1902 Great Britain, Germany, and Italy institute a blockade against the coast of Venezuela for the purpose of making her comply with their demands for indemnification of their subjects wronged during civil wars in Venezuela, and the latter consents to pay indemnities to be settled by a mixed commission of diplomatists. But as other Powers than those who had instituted the blockade likewise claim indemnities, the matter is referred to the permanent Court of Arbitration at the Hague, which, in 1904, gives its verdict in favour of the blockading Powers. In February of 1904 war breaks out in the Far East between Russia and Japan on account of Manchuria and Korea. In November of 1904 the United States of America make preparations for the convoking of another Peace Conference at the Hague.

Five Lessons of the History of the Law of Nations.

§ 51. It is the task of history, not only to show how things have grown in the past, but also to extract a moral for the future out of the events of the past. Five morals can be said to be deduced from the history of the development of the Law of Nations:

(1) The first and principal moral is that a Law of Nations can exist only if there is an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not and never can be a

central political authority above the Sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent. The history of the times of Louis XIV. and Napoleon I. shows clearly the soundness of this principle.

(2) The second moral is that International Law can develop progressively only when international politics, especially intervention, are made on the basis of real State interests. Dynastic wars belong to the past, as do interventions in favour of legitimacy. It is neither to be feared, nor to be hoped, that they should occur again in the future. But if they did, they would hamper the development of the Law of Nations in the future as they have done in the past.

(3) The third moral is that the principle of nationality is of such force that it is fruitless to try to stop its victory. Wherever a community of many millions of individuals, who are bound together by the same blood, language, and interests, become so powerful that they think it necessary to have a State of their own, in which they can live according to their own ideals and can build up a national civilisation, they will certainly get that State sooner or later. What international politics can do and should do is to enforce the rule that minorities of individuals of another race shall not be outside the law, but shall be treated on equal terms with the majority. States embracing a population of different nationalities can exist and will always exist, as many examples show.

(4) The fourth moral is that every progress in the development of International Law wants due time to ripen. In Utopia the projects of an eternal

peace and of an undisturbed fraternity of States and nations may be realised, but the rude reality of practical international life in our times does not provide any possibility of the realisation of such fanciful ideas. The presupposition of an eternal peace would at least be that the whole surface of the earth would be shared between nations of the same standard of civilisation, of the same interests, aims, and of the same strength, a fact which will never be realised so far as we can see. Eternal peace is an ideal, and in the very term "ideal" the conviction is involved of the impossibility of its realisation, although it is a duty to aim constantly at such realisation. The permanent Court of Arbitration at the Hague, now established by the Hague Peace Conference of 1899, is an institution that can bring us nearer to such realisation than ever could have been hoped. And codification of parts of the Law of Nations, following the codification of the rules regarding land warfare, will in due time arrive and so make the legal basis of international intercourse firmer, broader, and more prominent than before.

(5) The fifth, and last, moral is that the progressive development of International Law depends chiefly upon the standard of public morality on the one hand, and, on the other, upon economic interests. The higher the standard of public morality rises, the more will International Law progress. And the more important international economic interests grow, the more International Law will grow. For, looked upon from a certain standpoint, International Law is, just like Municipal Law, a product of moral and of economic factors, and at the same time the basis for a favourable development of moral and economic interests. This being an indisputable fact,

it may therefore fearlessly be maintained that an immeasurable progress is guaranteed to International Law, since there are eternal moral and economic factors working in its favour.

III

The Science of the Law of Nations

Phillimore, I., Preface to the first edition—Lawrence, §§ 31–36—Manning, pp. 21–65—Halleck, I. pp. 12, 15, 18, 22, 25, 29, 34, 42—Walker, History, I. pp. 203–337, and "The Science of International Law" (1893), *passim*—Taylor, §§ 37–48—Wheaton, §§ 4–13—Rivier in Holtzendorff, I. pp. 337–475—Nys, I. pp. 213–328—Martens, I. §§ 34–38—Fiore, I. Nos. 53–88, 164–185, 240–272—Calvo, I. pp. 27–34, 44–46, 51–55, 61–63, 70–73, 101–137—Bonfils, Nos. 147–153—Despagnet, Nos. 28–35—Kaltenborn, "Die Vorläufer des Hugo Grotius" (1848)—Holland, Studies, pp. 1–58, 168–175—Westlake, Chapters, pp. 23–77—Ward, "Enquiry into the Foundation and History of the Law of Nations," 2 vols. (1795)—Nys, "Le droit de la guerre et les précurseurs de Grotius" (1882), "Notes pour servir à l'histoire . . . du droit international en Angleterre" (1888), "Les origines du droit international" (1894)—Wheaton, "Histoire des progrès du droit des gens en Europe" (1841)—See also the bibliographies enumerated below in § 61.

Forerunners of Grotius.

§ 52. The science of the modern Law of Nations commences from Grotius's work, "De Jure Belli ac Pacis libri III.," because in it a fairly complete system of International Law was for the first time built up as an independent branch of the science of law. But there are many writers before Grotius who wrote on special parts of the Law of Nations. They are therefore commonly called "Forerunners of Grotius." The most important of these forerunners are the following: (1) Legnano, Professor of Law in the University of Bologna, who wrote in 1360 his book "De bello, de represaliis, et de duello," which was, however, not printed before 1477; (2) Belli, an Italian jurist and statesman, who

published in 1563 his book, "De re militari et de bello;" (3) Brunus, a German jurist, who published in 1548 his book, "De legationibus;" (4) Victoria, Professor in the University of Salamanca, who published in 1557 his "Relectiones theologicae,"[1] which partly deals with the Law of War; (5) Ayala, of Spanish descent but born in Antwerp, a military judge in the army of Alexandro Farnese, the Prince of Parma. He published in 1582 his book, "De jure et officiis bellicis et disciplina militari;" (6) Suarez, a Spanish Jesuit and Professor at Coimbra, who published in 1612 his "Tractatus de legibus et de legislatore," in which (II. c. 19, n. 8) for the first time the attempt is made to found a law between the States on the fact that they form a community of States; (7) Gentilis, an Italian jurist, who became Professor of Civil Law in Oxford. He published in 1585 his work, "De legationibus," in 1588 and 1589 his "Commentationes de jure belli," in 1598 an enlarged work on the same matter under the title "De jure belli libri tres,"[2] and in 1613 his "Advocatio Hispanica." Gentilis's book "De jure belli" supplies, as Professor Holland shows, the model and the framework of the first and third book of Grotius's "De jure belli ac pacis." "The first step"—Holland rightly says—"towards making International Law what it is was taken, not by Grotius, but by Gentilis."

Grotius.

§ 53. Although Grotius owes much to Gentilis, he is nevertheless the greater of the two and bears by right the title of "Father of the Law of Nations." Hugo Grotius was born at Delft in Holland in 1583.

[1] See details in Holland, Studies, pp. 51–52.

[2] Re-edited in 1877 by Professor Holland. On Gentilis, see Holland, Studies, pp. 1–391; Westlake Chapters, pp. 33–36; Walker, History, I. pp. 249–277.

He was from his earliest childhood known as a "wondrous child" on account of his marvellous intellectual gifts and talents. He began to study law at Leyden when only eleven years old, and at the age of fifteen he took the degree of Doctor of Laws at Orleans in France. He acquired a reputation, not only as a jurist, but also as a Latin poet and a philologist. He first practised as a lawyer, but afterwards took to politics and became involved in political and religious quarrels which led to his arrest in 1618 and condemnation to prison for life. In 1621, however, he succeeded in escaping from prison and went to live for ten years in France. In 1634 he entered into the service of Sweden and became Swedish Minister in Paris. He died in 1635 at Rostock in Germany on his way home from Sweden, whither he had gone to tender his resignation.

Even before he had the intention of writing a book on the Law of Nations Grotius took an interest in matters international. For in 1609, when only twenty-four years old, he published—anonymously at first—a book under the title "Mare liberum,'[1] in which he contended that the open sea could not be the property of any State, whereas the contrary opinion was generally prevalent.[1] But it was not before fourteen years later that Grotius began, during his exile in France, to write his "De Jure Belli ac Pacis libri III.," which was published, after a further two years, in 1625, and of which it has rightly been maintained that no other book, with the single exception of the Bible, has ever exercised a similar influence upon human minds and matters. The whole development

[1] See details with regard to the controversy concerning the freedom of the open sea below, §§ 248–250.

of the modern Law of Nations itself as well as that of the science of the Law of Nations takes root from this for ever famous book. Grotius's intention was originally to write a treatise on the Law of War, since the cruelties and lawlessness of warfare of his time incited him to the work. But thorough investigation into the matter led him further, and thus he produced a system of the Law of Nature and Nations. In the introduction he speaks of many of the authors before him, and he especially quotes Ayala and Gentilis. Yet, although he recognises their influence upon his work, he is nevertheless aware that his system is fundamentally different from those of his forerunners. There was in truth nothing original in Grotius's start from the Law of Nature for the purpose of deducing therefrom rules of a Law of Nations. Other writers before his time, and in especial Gentilis, had founded their works upon it. But nobody before him had done it in such a masterly way and with such a felicitous hand. And it is on this account that Grotius bears not only, as already mentioned, the title of "Father of the Law of Nations," but also that of "Father of the Law of Nature."

Grotius, as a child of his time, could not help starting from the Law of Nature, since his intention was to find such rules of a Law of Nations as were eternal, unchangeable, and independent of the special consent of the single States. Long before Grotius, the opinion was generally prevalent that above the positive law, which had grown up by custom or by legislation of a State, there was in existence another law which had its roots in human reason and which could therefore be discovered without any knowledge of positive law. This law of reason was called Law of Nature or Natural Law. But the system of

the Law of Nature which Grotius built up and from which he started when he commenced to build up the Law of Nations, became the most important and gained the greatest influence, so that Grotius appeared to posterity as the Father of the Law of Nature as well as that of the Law of Nations.

Whatever we may nowadays think of this Law of Nature, the fact remains unshaken that for more than two hundred years after Grotius jurists, philosophers, and theologians firmly believed in it. And there is no doubt that, but for the systems of the Law of Nature and the doctrines of its prophets, the modern Constitutional Law and the modern Law of Nations would not be what they actually are. The Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. The modern Law of Nations in especial owes its very existence to the theory of the Law of Nature. Grotius did not deny that there existed in his time already a good many customary rules for the international conduct of the States, but he expressly kept them apart from those rules which he considered the outcome of the Law of Nature. He distinguishes, therefore, between the *natural* Law of Nations on the one hand, and, on the other hand, the *customary* Law of Nations, which he calls the *voluntary* Law of Nations. The bulk of Grotius's interest is concentrated upon the natural Law of Nations, since he considered the voluntary of minor importance. But nevertheless he does not quite neglect the voluntary Law of Nations. Although he mainly and chiefly lays down the rules of the natural Law of Nations, he always mentions also voluntary rules concerning the different matters.

Grotius's influence was soon enormous and reached over the whole of Europe. His book[1] went through more than forty-five editions, and many translations have been published.

Zouche.

§ 54. But the modern Law of Nations has another, though minor, founder besides Grotius, and this is an Englishman, Richard Zouche (1590–1660), Professor of Civil Law at Oxford and a Judge of the Admiralty Court. A prolific writer, the book through which he acquired the title of "Second founder of the Law of Nations," appeared in 1650 and bears the title: "Juris et judicii fecialis, sive juris inter gentes, et quaestionum de eodem explicatio, qua, quae ad pacem et bellum inter diversos principes aut populos spectant, ex praecipuis historico jure peritis exhibentur." This little book has rightly been called the first manual of the *positive* Law of Nations. The standpoint of Zouche is totally different from that of Grotius in so far as, according to him, the customary Law of Nations is the most important part of that law, although, as a child of his time, he does not at all deny the existence of a natural Law of Nations. It must be specially mentioned that Zouche is the first who used the term *jus inter gentes* for that new branch of law. Grotius knew very well and says that the Law of Nations is a law *between* the States, but he called it *jus gentium*, and it is due to his influence that until Bentham nobody called the Law of Nations *Inter*national Law.

The distinction between the natural Law of Nations, chiefly treated by Grotius, and the customary or voluntary Law of Nations, chiefly treated by Zouche,[2]

[1] See Rivier in Holtzendorff, I. p. 412. The last English translation is that by William Whewell of 1854.

[2] It should be mentioned that already before Zouche, another Englishman, John Selden, in his De jure naturali et gentium



gave rise in the seventeenth and eighteenth centuries to three different schools of writers on the Law of Nations—namely, the "Naturalists," the "Positivists," and the "Grotians."

The Naturalists.

§ 55. "Naturalists," or "Deniers of the Law of Nations," is the appellation of those writers who deny that there is any positive Law of Nations whatever as the outcome of custom or treaties, and who maintain that all Law of Nations is only a part of the Law of Nature. The leader of the Naturalists is Samuel Pufendorf (1632–1694), who occupied the first chair which was founded for the Law of Nature and Nations at a University—namely, that at Heidelberg. Among the many books written by Pufendorf, three are of importance for the science of International Law:—(1) "Elementa jurisprudentiae universalis," 1666; (2) "De jure naturae et gentium," 1672; (3) "De officio hominis et civis juxta legem naturalem," 1673. Starting from the assertion of Hobbes, "De Cive," XIV. 4, that Natural Law is to be divided into Natural Law of individuals and of States, and that the latter is the Law of Nations, Pufendorf[1] adds that outside this Natural Law of Nations no voluntary or positive Law of Nations exists which has the force of real law (*quod quidem legis proprie dictae vim habeat, quae gentes tamquam a superiore profecta stringat*).

The most celebrated follower of Pufendorf is the German philosopher Christian Thomasius (1655–1728), who published in 1688 his "Institutiones juris-

secundum disciplinam ebraeorum (1640), recognised the importance of the positive Law of Nations. The successor of Zouche as a Judge of the Admiralty Court, Sir Leoline Jenkins (1625–1684) ought also to be mentioned. His opinions concerning questions of maritime law and in especial prize law, were of the greatest importance for the development of maritime international law.

[1] De jure naturae et gentium, II. c. 3, § 22.

prudentiae divinae," and in 1705 his "Fundamenta juris naturae et gentium." Of English Naturalists may be mentioned Francis Hutcheson ("System of Moral Philosophy," 1755) and Thomas Rutherford ("Institutes of Natural Law; being the Substance of a Course of Lectures on Grotius read in St. John's College, Cambridge," 1754). Jean Barbeyrac (1674–1744), the learned French translator and commentator of the works of Grotius, Pufendorf, and others, and, further, Jean Jacques Burlamaqui (1694–1748), a native of Geneva, who wrote the "Principes du droit de la nature et des gens," ought likewise to be mentioned.

The Positivists.

§ 56. The "Positivists" are the antipodes of the Naturalists. They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive Law of Nations as the outcome of custom or international treaties, but consider it more important than the natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche. The positive writers had not much influence in the seventeenth century, during which the Naturalists and the Grotians carried the day, but their time came in the eighteenth century.

Of seventeenth-century writers, the Germans Rachel and Textor must be mentioned. Rachel published in 1676 his two dissertations, "De jure naturae et gentium," in which he defines the Law of Nations as the law to which a plurality of free States are subjected, and which comes into existence through tacit or express consent of these States (*Jus plurium liberalium gentium pacto sive placito expressim aut tacite initum, quo utilitatis gratia sibi in vicem obligantur*). Textor published in 1680 his "Synopsis juris gentium."

In the eighteenth century the leading Positivists, Bynkershoek, Moser, and Martens, gained an enormous influence.

Cornelius van Bynkershoek (1673–1743), a celebrated Dutch jurist, never wrote a treatise on the Law of Nations, but gained fame through three books dealing with different parts of this Law. He published in 1702 "De dominio maris," in 1721 "De foro legatorum," in 1737 "Quaestionum juris publici libri II." According to Bynkershoek the basis of the Law of Nations is the common consent of the nations which finds its expression either in international custom or in international treaties.

Johann Jakob Moser (1701–1785), a German Professor of Law, published many books concerning the Law of Nations, of which three must be mentioned: (1) "Grundsätze des jetzt üblichen Völkerrechts in Friedenszeiten," 1750; (2) "Grundsätze des jetzt üblichen Völkerrechts in Kriegszeiten," 1752; (3) "Versuch des neuesten europäischen Völkerrechts in Friedens- und Kriegszeiten," 1777–1780. Moser's books are magazines of an enormous number of facts which are of the greatest value for the positive Law of Nations. Moser never fights against the Naturalists, but he is totally indifferent towards the natural Law of Nations, since to him the Law of Nations is positive law only and based on international custom and treaties.

Georg Friedrich von Martens (1756–1821), Professor of Law in the University of Göttingen, also published many books concerning the Law of Nations. The most important is his "Précis du droit des gens moderne de l'Europe," published in 1789, of which William Cobbett published in 1795 at Philadelphia an English translation, and of which as late as

1864 appeared a new edition at Paris with notes by Charles Vergé. Martens began the celebrated collection of treaties which goes under the title "Martens, Recueil des Traités," and is continued to our days.[1] The influence of Martens was great, and even at the present time is considerable. He is not an exclusive Positivist, since he does not deny the existence of natural Law of Nations, and since he sometimes refers to the latter in case he finds a gap in the positive Law of Nations. But his interest is in the positive Law of Nations, which he builds up historically on international custom and treaties.

The Grotians.

§ 57. The "Grotians" stand midway between the Naturalists and the Positivists. They keep up the distinction of Grotius between the natural and the voluntary Law of Nations, but, in contradistinction to Grotius, they consider the positive or voluntary of equal importance to the natural, and they devote, therefore, their interest to both alike. Grotius's influence was so enormous that the majority of the authors of the seventeenth and eighteenth centuries were Grotians, but only two of them have acquired a European reputation—namely, Wolff and Vattel.

Christian Wolff (1679–1754), a German philosopher who was first Professor of Mathematics and Philosophy in the Universities of Halle and Marburg and afterwards returned to Halle as Professor of the Law of Nature and Nations, was seventy years of age when, in 1749, he published his "Jus gentium methodo scientifica pertractatum." In 1750 followed his "Institutiones juris naturae et gentium." Wolff's conception of the Law of Nations is influenced

[1] Georg Friedrich von Martens is not to be confounded with his nephew Charles de Martens, the author of the Causes célèbres de droit des gens and of the Guide diplomatique.

by his conception of the *Civitas gentium maxima*. The fact that there is a Family of Nations in existence is strained by Wolff into the doctrine that the totality of the States forms a world-State above the component member-States, the so-called *civitas gentium maxima*. He distinguishes four different kinds of Law of Nations—namely, the natural, the voluntary, the customary, and that which is expressly created by treaties. The latter two kinds are alterable, and have force only between those single States between which custom and treaties have created them. But the natural and the voluntary Law of Nations are both eternal, unchangeable, and universally binding upon all the States. In contradistinction to Grotius, who calls the customary Law of Nations "voluntary," Wolff names "voluntary" those rules of the Law of Nations which are, according to his opinion, tacitly imposed by the *civitas gentium maxima*, the world-State, upon the member-States.

Emerich de Vattel (1714–1767), a Swiss from Neuchâtel, who entered into the service of Saxony and became her Minister at Berne, did not in the main intend any original work, but undertook the task of introducing Wolff's teachings concerning the Law of Nations into the courts of Europe and to the diplomatists. He published in 1758 his book, "Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains." But it must be specially mentioned that Vattel expressly rejects Wolff's conception of the *civitas gentium maxima* in the preface to his book. Numerous editions of Vattel's book have appeared, and as late as 1863 Pradier-Fodéré re-edited it at Paris. An English translation by Chitty appeared in 1834 and went through several editions.

His influence was very great, and in diplomatic circles his book still enjoys an unshaken authority.

Treatises of the Nineteenth and Twentieth Centuries.

§ 58. Some details concerning the three schools of the Naturalists, Positivists, and Grotians were necessary because these schools are still in existence. I do not, however, intend to give a list of writers on special subjects, and the following list of treatises comprises the more important ones only.

(1) British Treatises.

William Oke Manning: Commentaries on the Law of Nations, 1839; new ed. by Sheldon Amos, 1875.

Archer Polson: Principles of the Law of Nations, 1848; 2nd ed. 1853.

Richard Wildman: Institutes of International Law, 1850.

Sir Robert Phillimore: Commentaries upon International Law, 4 vols., 1854–1861; 3rd ed. 1879–1888.

Sir Travers Twiss: The Law of Nations, etc., 2 vols. 1861–1863; 2nd ed. 1875–1884; French translation, 1887–1889.

Sheldon Amos: Lectures on International Law, 1874.

Sir Edward Shepherd Creasy: First Platform of International Law, 1876.

William Edward Hall: Treatise on International Law, 1880; 5th ed. 1904 (by Atlay).

Sir Henry Sumner Maine: International Law, 1883; 2nd ed. 1894 (Whewell Lectures, not a treatise).

James Lorimer: The Institutes of International Law, 2 vols. 1883–1884; French translation by Nys, 1885.

Leone Levi: International Law, 1888.

T. J. Lawrence: The Principles of International Law, 1895; 3rd ed. 1900.

Thomas Alfred Walker: A Manual of Public International Law, 1895.

Sir Sherston Baker: First Steps in International Law, 1899.

F. E. Smith: International Law, 1900. (One of the Temple Primers.)

John Westlake: International Law, vol. I. (Peace) 1904.

(2) North American Treatises.

James Kent: Commentary on International Law, 1826; English edition by Abdy, Cambridge, 1888.

Henry Wheaton: Elements of International Law, 1836; 8th American ed. by Dana, 1866; 3rd English ed. by Boyd, 1889; 4th English ed. by Atlay, 1904.

Theodore D. Woolsey: Introduction to the Study of International Law, 1860; 5th ed. 1879.

Henry W. Halleck: International Law, 2 vols. 1861; 3rd English ed. by Sir Sherston Baker, 1893.

Francis Wharton: A Digest of the International Law of the United States, 3 vols., 1886. (An official publication.)

George B. Davis: The Elements of International Law, 1887; revised ed. 1899.

Hannis Taylor: A Treatise on International Public Law, 1901.

(3) French Treatises.

Funck-Brentano et Albert Sorel: Précis du Droit des Gens, 1877; 2nd ed. 1894.

P. Pradier-Fodéré: Traité de Droit International Public, 7 vols. 1885–1897.

Henry Bonfils: Manuel de Droit International Public, 1894; 4th ed. by Fauchille, 1904.

Frantz Despagnet: Cours de Droit International Public, 1894; 2nd ed. 1899.

Robert Piédelièvre: Précis de Droit International Public, 2 vols. 1894–1895.

(4) German Treatises.

Theodor Schmalz: Europäisches Völkerrecht, 1816.

Johann Ludwig Klüber: Droit des Gens moderne, 1819; German ed. under the title of Europäisches Völkerrecht in 1821; last German ed. by Morstadt in 1851, and last French ed. by Ott in 1874.

Friedrich Saalfeld: Handbuch des positiven Völkerrechts, 1833.

August Wilhelm Heffter: Das europäische Völkerrecht der Gegenwart, 1844; 8th ed. by Geffcken, 1888; French translations by Bergson in 1851 and Geffcken in 1883.

Heinrich Bernhard Oppenheim: System des Völkerrechts, 1845; 2nd ed. 1866.

Johann Caspar Bluntschli: Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 1868; 3rd ed. 1878; French translation by Lardy, 1869; 5th ed. 1895.

Adolf Hartmann: Institutionen des praktischen Völkerrechts in Friedenszeiten, 1874; 2nd ed. 1878.

Franz von Holtzendorff: Handbuch des Völkerrechts, 4 vols. 1885–1889. Holtzendorff is the editor and a contributor but there are many other contributors.

August von Bulmerincq: Das Völkerrecht, 1887.

Karl Gareis: Institutionen des Völkerrechts, 1888; 2nd ed. 1901.

E. Ullmann: Völkerrecht, 1898.

Franz von Liszt: Das Völkerrecht, 1898; 3rd ed. 1900.

(5) Italian Treatises.

Luigi Casanova: Lezioni di diritto internazionale, published after the death of the author by Cabella, 1853; 3rd ed. by Brusa, 1876.

Pasquale Fiore: Trattato di diritto internazionale publico, 1865; 2nd ed. in 3 vols. 1879–1884; French translation by Antoine, 1885.

Giuseppe Carnazza-Amari: Trattato di diritto internazionale di pace, 2 vols. 1867–1875; French translation by Montanari-Pevest, 1881.

Antonio del Bon: Institutioni del diritto publico internazionale, 1868.

Giuseppe Sandona: Trattato di diritto internazionale moderno, 2 vols. 1870.

Gian Battista Pertille: Elementi di diritto internazionale, 2 vols. 1877.

Augusto Pierantoni: Trattato di diritto internazionale, vol. I. 1881. (No further volume has appeared.)

(6) Spanish and Spanish-American Treatises.

Andrés Bello: Principios de derecho de gentes (internacional) 1832, last ed. in 2 vols. by Silva, 1883.

José Maria de Pando: Elementos del derecho internacional, published after the death of the author, 1843–1844.

Antonio Riquelme: Elementos de derecho público internacional etc.; 2 vols. 1849.

Carlos Calvo: Le Droit International etc. (first edition in Spanish, following editions in French), 1868; 5th ed. in 6 vols. 1896.

Amancio Alcorta: Curso de derecho internacional público, vol. I. 1886; French translation by Lehr, 1887.

Marquis de Olivart: Trattato y notas de derecho internacional público, 2 vols. 1887; 4th ed. 1903.

Luis Gesteso y Acosta: Curso de derecho internacional público, 1894.

Miguel Cruchaga: Nociones de derecho internacional, 1899; 2nd ed. 1902.

(7) Treatises of Authors of other Nationalities.

Frederick Kristian Bornemann: Forelæsninger over den positive Folkeret, 1866.

Friedrich von Martens: Völkerrecht, 2 vols. 1883; a German translation by Berghohm of the Russian original. A French translation in 3 vols. appeared in the same year.

Jan Helenus Ferguson: Manual of International Law, etc., 2 vols. 1884. The author is Dutch, but the work is written in English.

Alphonse Rivier: Lehrbuch des Völkerrechts, 1894; 2nd ed. 1899 and the larger work in two vols. under the title: Principes du Droit des Gens, 1896. The author of these two excellent books was a Swiss who taught International Law at the University of Brussels.

H. Matzen: Forelæsninger over den positive Folkeret, 1900.

Ernest Nys: Le droit international, vol. I. 1894. The author of this exhaustive treatise is a Belgian jurist whose researches in the history of the science of the Law of Nations have gained him far-reaching reputation.[1]

The Science of the Law of Nations in the Nineteenth Century, as represented by treatises.

§ 59. The Science of the Law of Nations, as left by the French Revolution, developed progressively during the nineteenth century under the influence of three factors. The first factor is the endeavour, on the whole sincere, of the Powers since the Congress of Vienna to submit to the rules of the Law of Nations. The second factor is the many law-making treaties which arose during this century. And the last, but not indeed the least factor, is the downfall of the theory of the Law of Nature, which after many

[1] This volume of Nys contains in its pp. 251–328 an exhaustive enumeration of all more important works on International Law, treatises as well as monographs, and I have much pleasure in referring my readers to this learned work.

hundreds of years has at last been shaken off during the second half of this century.

When the century opens, the three schools of the Naturalists, the Positivists, and the Grotians are still in the field, but Positivism gains slowly and gradually the upper hand, until at the end it may be said to be victorious without, however, being omnipotent. The most important writer[1] up to 1836 is Klüber, who may be called a Positivist in the same sense as Martens, for he also applies the natural Law of Nations to fill up the gaps of the positive. Wheaton appears in 1836 with his "Elements," and, although an American, at once attracts the attention of the whole of Europe. He may be called a Grotian. And the same may be maintained of Manning, whose treatise appeared in 1839, and is the first that attempts a survey of British practice regarding sea warfare based on the judgments of Sir William Scott (Lord Stowell). Heffter, whose book appeared in 1844, is certainly a Positivist, although he does not absolutely deny the Law of Nature. In exact application of the juristic method, Heffter's book excels all former ones, and all the following authors are in a sense standing on his shoulders. In Phillimore, Great Britain sends in 1854 a powerful author into the arena, who may on the whole be called a Positivist of the same kind as Martens and Klüber. Generations to come will consult Phillimore's volumes on account of the vast material they contain and the sound judgment they exhibit. And the same is valid with regard to Sir Travers Twiss, whose first volume appeared in 1861. Halleck's book, which

[1] I do not intend to discuss the merits of the writers on special subjects, and I mention only the authors of the most important treatises.

appeared in the same year, is of special importance as regards war, because the author, who was a general in the service of the United States, gave to this part his special attention. The next prominent author, the Italian Fiore, who published his system in 1865 and may be called a Grotian, is certainly the most prominent Italian author, and the new edition of his work will for a long time to come be consulted. Bluntschli, the celebrated Swiss-German author, published his book in 1867; it must, in spite of the world-wide fame of its author, be consulted with caution, because it contains many rules which are not yet recognised rules of the Law of Nations. Calvo's book, which first appeared in 1868, contains an invaluable store of facts and opinions, but its juristic basis is not very exact.

From the seventies of the century the influence of the downfall of the theory of the Law of Nature becomes visible in the treatises on the Law of Nations, and therefore real positivistic treatises make their appearance. For the Positivism of Zouche, Bynkershoek, Martens, Klüber, Heffter, Phillimore, and Twiss was no real Positivism, since these authors recognised a natural Law of Nations, although they did not make much use of it. Real Positivism must entirely avoid a natural Law of Nations. We know nowadays that a Law of Nature does not exist. Just as the so-called Natural Philosophy had to give way to real natural science, so the Law of Nature had to give way to jurisprudence, or the philosophy of the positive law. Only a positive Law of Nations can be a branch of the science of law.

The first real positive treatise known to me is Hartmann's "Institutionen des praktischen Völker-

rechts in Friedenszeiten," which appeared in 1874, but is hardly known outside Germany. In 1880 Hall's treatise appeared and at once won the attention of the whole world; it is one of the best books on the Law of Nations that have ever been written.[1] The Russian Martens, whose two volumes appeared in German and French translations in 1883 and at once put their author in the forefront of the authorities, certainly intends to be a real Positivist, but traces of Natural Law are nevertheless now and then to be found in his book. A work of a special kind is that of Holtzendorff, the first volume of which appeared in 1885. Holtzendorff himself is the editor and at the same time a contributor to the work, but there are many other contributors, each of them dealing exhaustively with a different part of the Law of Nations. The copious work of Pradier-Fodéré, which also began to appear in 1885, is far from being positive, although it has its merits. Wharton's three volumes, which appeared in 1886, are not a treatise, but contain the international practice of the United States. In 1894 three French jurists, Bonfils, Despagnet, and Piédelièvre, step into the arena; their treatises are comprehensive and valuable, but not absolutely positive. On the other hand, the English authors Lawrence and Walker, whose treatises appeared in 1895, and Westlake, whose first volume appeared in 1904, are real Positivists, and so are the Swiss-Belgian Rivier, the Germans Ullmann, Liszt, and Gareis, and the American Hannis Taylor.

[1] Lorimer, whose first volume appeared in 1883, is a Naturalist pure and simple.

§ 60. COLLECTION OF TREATIES.

(1) General Collections.

Leibnitz: Codex iuris gentium diplomaticus (1693); Mantissa codicis iuris gentium diplomatici (1700).

Bernard: Recueil des traités, etc. 4 vols. (1700).

Dumont: Corps universel diplomatique, etc., 8 vols. (1726–1731).

Rousset: Supplément au corps universel diplomatique de Dumont, 5 vols. (1739).

Schmauss: Corpus iuris gentium academicum (1730).

Wenck: Codex iuris gentium recentissimi, 3 vols. (1781, 1786, 1795).

Martens: Recueil de Traités d'Alliance, etc., 8 vols. (1791–1808); Nouveau Recueil de Traités d'Alliance, etc., 16 vols. (1817–1842); Nouveaux Suppléments au Recueil de Traités et d'autres Actes remarquables etc., 3 vols. (1839–1842); Nouveau Recueil Général de Traités, Conventions et autres Actes remarquables etc., 20 vols. (1843–1875); Nouveau Recueil Général de Traités et autres Actes relatifs aux Rapports de droit international. Deuxième Série, vol. I. 1876, continued up to date. Present editor, Felix Stoerk, professor in the University of Greifswald in Germany.

Ghillany: Diplomatisches Handbuch, 3 vols. (1855–1868).

Martens et Cussy: Recueil manuel etc., 7 vols. (1846–1857); continuation by Geffcken, 3 vols. (1885–1888).

British and Foreign State Papers: Vol. I. 1814, continued up to date.

Das Staatsarchiv: Sammlung der officiellen Actenstücke zur Geschichte der Gegenwart, vol. I. 1861, continued up to date.

Archives diplomatiques: Recueil mensuel de droit international, de diplomatie et d'histoire, first and second series (1861–1900), third series from 1901 continued up to date (4 vols. yearly).

(2) Collections of English Treaties only.

Jenkinson: Collection of all the Treaties, etc., between Great Britain and other Powers from 1648 to 1783, 3 vols. (1785).

Chalmers: A Collection of Maritime Treaties of Great Britain and other Powers, 2 vols. (1790).

Hertslet: Collection of Treaties and Conventions between Great Britain and other Powers (vol. I. 1820, continued to date).

Treaty Series: Vol. I. 1892, and a volume every year.

§ 61. BIBLIOGRAPHIES.

Ompteda: Litteratur des gesammten Völkerrechts, 2 vols. (1785).

Kamptz: Neue Litteratur des Völkerrechts seit 1784 (1817).

Klüber: Droit des gens moderne de l'Europe (Appendix) (1819).

Mohl: Geschichte und Litteratur der Staatswissenschaften, vol. I. pp. 337–475 (1855).

Rivier: pp. 393–523 of vol. I. of Holtzendorff's Handbuch des Völkerrechts (1885).

Stoerk: Die Litteratur des internationalen Rechts von 1884–1894 (1896).

Olivart: Catalogue d'une bibliothèque de droit international (1899).

Nys: Le droit international, vol. I. (1904), pp. 213–328.

§ 62. PERIODICALS.

Revue de droit international et de législation comparée. It appears in Brussels since 1869, one volume yearly. Present editor: Edouard Rolin.

Revue générale de droit international public. It appears in Paris since 1894, one volume yearly. Founder and present editor, Paul Fauchille.

Zeitschrift für internationales privat und öffentliches Recht. It appears in Leipzig since 1891, one volume yearly. Present editor, Theodor Niemeyer.

Annuaire de l'Institut de Droit International, vol. I. 1877. A volume appears after each meeting of the Institute.

Essays and Notes concerning International Law frequently appear also in the Journal du droit international privé et de la Jurisprudence comparée (Clunet), the Archiv für öffentliches Recht, The Law Quarterly Review, The Law Magazine and Review, The Journal of the Society of Comparative Legislation, The American Law Review, the Annalen des deutschen Reiches, the Zeitschrift für das privat- und öffentliche Recht der Gegenwart (Grünhut), the Revue de droit public et de la science politique (Larnaude), the Annales des sciences politiques, the Archivio giuridico.

PART I

THE SUBJECTS OF THE LAW OF NATIONS

CHAPTER I

INTERNATIONAL PERSONS

I

Sovereign States as International Persons

Vattel, I. §§ 1–12—Hall, § 1—Lawrence, § 42—Phillimore, I. §§ 61–69—Twiss, I. §§ 1–11—Taylor, § 117—Walker, § 1—Westlake, I. pp. 1–5, 20–21—Wheaton, §§ 16–21—Ullmann, § 10—Heffter, § 15—Holtzendorff in Holtzendorff, II. pp. 5–11—Bonfils, Nos. 160–164—Despagnet, Nos. 69–74—Pradier-Fodéré, I. Nos. 43–81—Nys, I. pp. 329–356—Rivier, I. § 3—Calvo, I. §§ 39–41—Fiore, I. Nos. 305–309—Martens, I. §§ 53–54.

Real and apparent International Persons.

§ 63. The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is, therefore, a member of the Family of Nations, is an International Person. Sovereign States exclusively are International Persons—i.e. subjects of International Law. There are, however, as will be seen, full and not-full Sovereign States. Full Sovereign States are perfect, not-full Sovereign States are imperfect International Persons, for not-full Sovereign States are for some parts only subjects of International Law.

In contradistinction to Sovereign States which are real, there are also apparent, but not real, International Persons—namely, Confederations of States, insurgents recognised as a belligerent Power in a

civil war, and the Holy See. All these are not, as will be seen,[1] real subjects of International Law, but in some points are treated as though they were International Persons, without becoming thereby members of the Family of Nations.

It must be specially mentioned that the character of a subject of the Law of Nations and of an International Person can be attributed neither to monarchs, diplomatic envoys, and private individuals, nor to chartered companies, nations, or races after the loss of their State (as, for instance, the Jews or the Poles), and organised wandering tribes.[2]

Conception of the State.

§ 64. A State proper—in contradistinction to so-called Colonial States—is in existence when a people is settled in a country under its own Sovereign Government. The conditions which must obtain for the existence of a State are therefore four:

There must, first, be a *people*. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.

There must, secondly, be a *country* in which the people has settled down. A wandering people, such as the Jews were whilst in the desert for forty years before their conquest of the Holy Land, is not a State. But it matters not whether the country is small or large; it may consist, as with City States, of one town only.

There must, thirdly, be a *Government*—that is, one

[1] See below, § 88 (Confederations of States), § 106 (Holy See), and Vol. II. §§ 59 and 76 (Insurgents).

[2] Most jurists agree with this opinion, but there are some who disagree. Thus, Heffter (§ 48) claims for monarchs the character of subjects of the Law of Nations, and Lawrence (§§ 42, 54, 55) claims that character for corporations and individuals. The matter will be discussed below in §§ 288, 290 344, 384.

or more persons who are the representatives of the people and rule according to the law of the land. An anarchistic community is not a State.

There must, fourthly and lastly, be a *Sovereign* Government. Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all round, within and without the borders of the country.

Not-full Sovereign States.

§ 65. A State in its normal appearance does possess independence all round and therefore full sovereignty. Yet there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full Sovereign States. All such States as are under the suzerainty or under the protectorate of another State or are member-States of a so-called Federal State, belong to this group. All of them possess supreme authority and independence with regard to a part of the tasks of a State, whereas with regard to another part they are under the authority of another State. Hence it is that the question is disputed whether such not-full Sovereign States can be International Persons and subjects of the Law of Nations at all.[1]

That they cannot be full, perfect, and normal subjects of International Law, there is no doubt. But it is wrong to maintain that they can have no international position whatever and can never be members of the Family of Nations at all. If we look at the

[1] The question will be discussed again below, §§ 89, 91, 93, with regard to each kind of not-full Sovereign States. The object of discussion here is the question whether such States can be considered as International Persons at all. Westlake, I. p. 21, answers it affirmatively by stating: "It is not necessary for a State to be independent in order to be a State of International Law."

matter as it really stands, we observe that they actually often enjoy in many points the rights and fulfil in other points the duties of International Persons. They often send and receive diplomatic envoys or at least consuls, they often conclude commercial or other international treaties, their monarchs enjoy the privileges which according to the Law of Nations the Municipal Laws of the different States must grant to the monarchs of foreign States. No other explanation of these and similar facts can be given except that these not-full Sovereign States are in some way or another International Persons and subjects of International Law. Such imperfect International Personality is, of course, an anomaly; but the very existence of States without full sovereignty is an anomaly in itself. And history teaches that States without full sovereignty have no durability, since they either gain in time full sovereignty or disappear totally as separate States and become mere provinces of other States. So anomalous are these not-full Sovereign States that no hard and fast general rule can be laid down with regard to their position within the Family of Nations, since everything depends upon the special case. What may be said in general concerning all the States without full sovereignty is that their position within the Family of Nations, if any, is always more or less overshadowed by other States. But their partial character of International Persons comes clearly to light when they are compared with so-called Colonial States, such as the Dominion of Canada or the Commonwealth of Australia. Colonial States have no international position whatever; they are, from the standpoint of the Law of Nations, nothing else than colonial portions of the mother country, although they enjoy perfect self-government,

and may therefore in a sense be called States. The deciding factor is that their Governor, who has a *veto*, is appointed by the mother country, and that the Parliament of the mother country could withdraw self-government from its Colonial States and legislate directly for them.

Divisibility of Sovereignty contested.

§ 66. The distinction between States full Sovereign and not-full Sovereign is based upon the opinion that sovereignty is divisible, so that the powers connected with sovereignty need not necessarily be united in one hand. But many jurists deny the divisibility of sovereignty and maintain that a State is either sovereign or not. They deny that sovereignty is a characteristic of every State and of the membership of the Family of Nations. It is therefore necessary to face the conception of sovereignty more closely. And it will be seen that there exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.[1]

Meaning of Sovereignty in the Sixteenth and Seventeenth Centuries.

§ 67. The term Sovereignty was introduced into political science by Bodin in his celebrated book, "De la République," which appeared in 1577. Before Bodin, at the end of the Middle Ages, the word *souverain*[2] was used in France for an authority, political or other, which had no other authority above itself. Thus the highest courts were called

[1] The literature upon sovereignty is extensive. The following authors give a survey of the opinions of the different writers:—Dock, Der Souveränitäts-begriff von Bodin bis zu Friedrich dem Grossen, 1897; Merriam, History of the Theory of Sovereignty since Rousseau, 1900; Rehm, Allgemeine Staatslehre, 1899, §§ 10–16. See also Maine, Early Institutions, pp. 342–300.

[2] *Souverain* is derived either from the Latin *superanus*, or from *suprema potestas*.

Cours Souverains. Bodin, however, gave quite a new meaning to the old conception. Being under the influence and in favour of the policy of centralisation initiated by Louis XI. of France (1461–1483), the founder of French absolutism, he defined sovereignty as "the absolute and perpetual power within a State." Such power is the supreme power within a State without any restriction whatever except the Commandments of God and the Law of Nature. No constitution can limit sovereignty, which is an attribute of the king in a monarchy and of the people in a democracy. A Sovereign is above positive law. A contract only is binding upon the Sovereign, because the Law of Nature commands that a contract shall be binding.[1]

The conception of sovereignty thus introduced was at once accepted by writers on politics of the sixteenth century, but the majority of these writers taught that sovereignty could be restricted by a constitution and by positive law. Thus at once a somewhat weaker conception of sovereignty than that of Bodin made its appearance. On the other hand, in the seventeenth century, Hobbes went even beyond Bodin, maintaining[2] that a Sovereign was not bound by anything and had a right over everything, even over religion. Whereas a good many publicists followed Hobbes, others, especially Pufendorf, denied, in contradistinction to Hobbes, that sovereignty includes omnipotence. According to Pufendorf, sovereignty is the supreme power in a State, but not absolute power, and sovereignty may well be constitutionally restricted.[3] But in spite of

[1] See Bodin, De la république, I. c. 8.

[2] See Hobbes, De cive, c. 6, §§ 12–15.

[3] See Pufendorf, De jure naturae et gentium, VII. c. 6, §§ 1–13.

all the differences in defining sovereignty, all authors of the sixteenth and seventeenth centuries agree that sovereignty is indivisible and contains the centralisation of all power in the hands of the Sovereign, whether a monarch or the people itself in a republic. Yet the way for another conception of sovereignty is prepared by Locke, whose "Two Treatises on Government" appeared in 1689, and paved the way for the doctrine that the State itself is the original Sovereign, and that all supreme powers of the Government are derived from this sovereignty of the State.

Meaning of Sovereignty in the Eighteenth Century.

§ 68. In the eighteenth century matters changed again. The fact that the several hundred reigning princes of the member-States of the German Empire had practically, although not theoretically, become more or less independent since the Westphalian Peace, enforced the necessity upon publicists to recognise a distinction between an absolute, perfect, full sovereignty, on the one hand, and, on the other, a relative, imperfect, not-full or half-sovereignty. Absolute and full sovereignty was attributed to those monarchs who enjoyed an unqualified independence within and without their States. Relative and not-full sovereignty, or half-sovereignty, was attributed to those monarchs who were, in various points of internal or foreign affairs of State, more or less dependent upon other monarchs. By this distinction the divisibility of sovereignty was recognised. And when in 1787 the United States of America turned from a Confederation of States into a Federal State, the division of sovereignty between the Sovereign Federal State and the Sovereign member-States appeared. But it cannot be maintained that divisibility of sovereignty was universally recognised in

the eighteenth century. It suffices to mention Rousseau, whose "Contrat Social" appeared in 1762 and defended again the indivisibility of sovereignty. Rousseau's conception of sovereignty is essentially that of Hobbes, since it contains absolute supreme power, but he differs from Hobbes in so far as, according to Rousseau, sovereignty belongs to the people only and exclusively, is inalienable, and therefore cannot be transferred from the people to any organ of the State.

Meaning of Sovereignty in the Nineteenth Century.

§ 69. During the nineteenth century three different factors of great practical importance have exercised their influence on the history of the conception of sovereignty.

The first factor is, that, with the exception of Russia, all civilised Christian monarchies have now turned into more or less constitutional monarchies. Thus identification of sovereignty with absolutism belongs practically to the past, and the fact is now generally recognised that a sovereign monarch may well be restricted in the exercise of his powers by a Constitution and positive law.

The second factor is, that the example of a Federal State set by the United States has been followed by Switzerland, Germany, and others. The Constitution of Switzerland as well as that of Germany declares decidedly that the member-States of the Federal State remain Sovereign States, thus indirectly recognising the divisibility of sovereignty between the member-States and the Federal State according to different matters.

The third and most important factor is, that the science of politics has learned to distinguish between sovereignty of the State and sovereignty of the organ which exercises the powers of the State. The

majority of publicists teach nowadays that neither the monarch, nor Parliament, nor the people is originally Sovereign in a State, but the State itself. Sovereignty, we say nowadays, is a natural attribute of every State as a State. But a State, as a Juristic Person, wants organs to exercise its powers. The organ or organs which exercise for the State powers connected with sovereignty are said to be sovereign themselves, yet it is obvious that this sovereignty of the organ is derived from the sovereignty of the State. And it is likewise obvious that the sovereignty of a State may be exercised by the combined action of several organs, as, for instance, in Great Britain, King and Parliament are the joint administrators of the sovereignty of the State. And it is, thirdly, obvious that a State can, as regards certain matters, have its sovereignty exercised by one organ, and as regards other matters by another organ.

In spite of this condition of things, the old controversy regarding divisibility of sovereignty has by no means died out. It acquired a fresh stimulus, on the one hand, through Switzerland and Germany turning into Federal States, and, on the other, through the conflict between the United States of America and her Southern member-States. The theory of the concurrent sovereignty of the Federal State and its member-States, as defended by "The Federalist" (Alexander Hamilton, James Madison, and John Jay) in 1787, was in Germany taken up by Waitz,[1] whom numerous publicists followed. The theory of the indivisibility of sovereignty was defended by Calhoun,[2] and many European publicists followed him in time.

[1] Politik, 1862. [2] A Disquisition on Government, 1851.

Result of the Controversy regarding Sovereignty.

§ 70. From the foregoing sketch of the history of the conception of sovereignty it becomes apparent that there is not and never was unanimity regarding this conception. It is therefore no wonder that the endeavour has been made to eliminate the conception of sovereignty from the science of politics altogether, and likewise to eliminate sovereignty as a necessary characteristic of statehood, so that States with and without sovereignty would in consequence be distinguishable. It is a fact that sovereignty is a term used without any well-recognised meaning except that of supreme authority. Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, condition of affairs. As there can be no doubt about the fact that there are semi-independent States in existence, it may well be maintained that sovereignty is divisible.

II

Recognition of States as International Persons

Hall, §§ 2 and 26—Lawrence, §§ 56-60—Phillimore, II. §§ 10-23—Taylor, §§ 153-160—Walker, § 1—Westlake, I. pp. 49-58—Wheaton, § 27—Bluntschli, §§ 28-38—Hartmann, § 11—Heffter, § 23—Holtzendorff in Holtzendorff, II. pp. 18-33—Liszt, § 5—Ullmann, §§ 20-21—Bonfils, Nos. 195-213—Despagnet, Nos. 79-85—Pradier-Fodéré, I. Nos. 136-145—Nys, I. pp. 69-115—Rivier, I. § 3—Calvo, I. §§ 87-98—Fiore, I. Nos. 311-320—Martens, I. §§ 63-64—Le Normand, "La reconnaissance internationale et ses diverses applications" (1899).

Recognition a condition of Membership of the Family of Nations.

§ 71. As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not include membership of the Family of Nations. There are States in existence, although their number decreases gradually, which are not, or not

fully, members of that family because their civilisation, if any, does not enable them and their subjects to act in conformity with the principles of International Law. Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members which have been recognised by the body of members already in existence when they were born.[1] For every State that is not already, but wants to be, a member, recognition is therefore necessary. A State is and becomes an International Person through recognition only and exclusively.

Many writers do not agree with this opinion. They maintain that, if a new civilised State comes into existence either by breaking off from an existing recognised State, as Belgium did in 1831, or otherwise, such new State enters of right into the Family of Nations and becomes of right an International Person.[2] They do not deny that practically such recognition is necessary to enable every new State to enter into official intercourse with other States. Yet they assert that theoretically every new State becomes a member of the Family of Nations *ipso facto* by its rising into existence, and that recognition supplies only the necessary evidence for this fact.

If the real facts of international life are taken into consideration, this opinion cannot stand. It is a rule of International Law that no new State has a right towards other States to be recognised by them, and that no State has the duty to recognise a new State. It is generally agreed that a new State before its recognition cannot claim any right which a member

[1] See above, §§ 27 and 28.

[2] See, for instance, Hall, §§ 2 and 26; Ullmann, § 20; Gareis, p. 64; Rivier, I. p. 57.

of the Family of Nations has towards other members. It can, therefore, not be seen what the function of recognition could be if a State entered with its birth really of right into the membership of the Family of Nations. There is no doubt that statehood itself is independent of recognition. International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.

Mode of Recognition.

§ 72. Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an International Person and a member of the Family of Nations. Recognition is given either expressly or tacitly. If a new State asks formally for recognition and receives it in a formal declaration of any kind, it receives express recognition. On the other hand, recognition is tacitly and indirectly given when an old State enters officially into intercourse with the new, be it by sending or receiving a diplomatic envoy,[1] or by concluding a treaty, or by any other act through which it becomes apparent that the new State is actually treated as an International Person.

But no new State has by International Law a right to demand recognition, although practically such recognition cannot in the long run be withheld, because without it there is no possibility of entering into intercourse with the new State. The interests of the old States must suffer quite as much as those of the new State, if recognition is for any length of time refused, and practically these interests in time

[1] Whether the sending of a consul includes recognition is discussed below, § 428.

enforce either express or tacit recognition. History nevertheless records many cases of protracted recognition,[1] and, apart from other proof, it becomes thereby apparent that the granting or the denial of recognition is not a matter of International Law but of international policy.

It must be specially mentioned that recognition by one State is not at all binding upon other States, so that they must follow suit. But in practice such an example, if set by one or more Great Powers and at a time when the new State is really established on a sound basis, will make many other States at a later period give their recognition too.

Recognition under Conditions.

§ 73. Recognition will as a rule be given without any conditions whatever, provided the new State is safely and permanently established. Since, however, the granting of recognition is a matter of policy, and not of law, nothing prevents an old State from making the recognition of a new State dependent upon the latter fulfilling certain conditions. Thus the Powers assembled at the Berlin Congress in 1878 recognised Bulgaria, Montenegro, Servia, and Roumania under the condition only that these States did not[2] impose any religious disabilities on any of their subjects.[3] The meaning of such conditional recognition is not that recognition can be withdrawn in case the condition is not complied with. The nature of the thing makes recognition, if once given, incapable of withdrawal. But conditional recognition, if accepted by the new State, imposes the

[1] See the cases enumerated by Rivier, I. p. 58.

[2] This condition contains a restriction on the personal supremacy of the respective States. See below, § 128.

[3] See arts. 5, 25, 35, and 44 of the Treaty of Berlin of 1878, in Martens, N.R.G. 2nd Ser. III. p. 449.

internationally legal duty upon such State to comply with the condition, failing which a right of intervention is given to the other party for the purpose of making the recognised State comply with the imposed condition.

Recognition timely and precipitate.

§ 74. Recognition is of special importance in those cases where a new State tries to establish itself by breaking off from an existing State in the course of a revolution. And here the question is material whether a new State has really already safely and permanently established itself or only makes efforts to this end without having already succeeded. That in every case of civil war a foreign State can recognise the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands and set up a Government of their own, there is no doubt. But between this recognition as a belligerent Power and the recognition of these insurgents and their part of the country as a new State, there is a broad and deep gulf. And the question is precisely at what exact time recognition of a new State may be given instead of the recognition as a belligerent Power. For an untimely and precipitate recognition as a new State is a violation of the dignity[1] of the mother State, to which the latter need not patiently submit.

In spite of the importance of the question, no hard and fast rule can be laid down as regards the time when it can be said that a State created by revolution has established itself safely and permanently. The characteristic of such safe and permanent esta-

[1] It is frequently maintained that such untimely recognition contains an intervention. But this is not correct, since intervention is (see below, § 134) *dictatorial* interference in the affairs of another State. The question of recognition of the belligerency of insurgents is exhaustively treated by Westlake, I. pp. 50–57.

blishment may be found in the fact either that the revolutionary State has utterly defeated the mother-State, or that the mother-State has ceased to make efforts to subdue the revolutionary State, or even that the mother-State, in spite of its efforts, is apparently incapable of bringing the revolutionary back under its sway. Of course, as soon as the mother-State itself recognises the new State, there is no reason for other States to withhold any longer their recognition, although they have even then no legal obligation to grant it.

The breaking off of the American States from their European mother-State furnishes many illustrative examples. Thus the recognition of the United States by France in 1778 was precipitate. But when in 1782 England herself recognised the independence of the United States, other States could accord recognition too without giving offence to England. Again, when the South American colonies of Spain declared their independence in 1810, no Power recognised the new States for many years. When, however, it became apparent that Spain, although she still kept up her claims, was not able to restore her sway, the United States recognised the new States in 1822, and England followed the example in 1824 and 1825.[1]

State Recognition in contradistinction to other Recognitions.

§ 75. Recognition of a new State must not be confounded with other recognitions. Recognition of insurgents as a belligerent Power has already been mentioned. Besides this, recognition of a change in the form of the government or of change in the title of an old State is a matter of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a

[1] See Gibbs, Recognition: a Chapter from the History of the North American and the South American States, 1863.

foreign State refuses the recognition of a change in the form of the government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly. And if recognition of a new title [1] of an old State is refused, the only consequence is that such State cannot claim any privileges connected with the new title.

III

Changes in the Condition of International Persons

Grotius, II. c. 9, §§ 5-13—Pufendorf, VIII. c. 12—Vattel, I. § 11—Hall, § 2—Halleck, I. pp. 89-92—Phillimore, I. §§ 124-137—Taylor, § 163—Westlake, I. pp. 58-66—Wheaton, §§ 28-32—Bluntschli, §§ 39-53—Hartmann, §§ 12-13—Heffter, § 24—Holtzendorff in Holtzendorff, II. pp. 21-23—Liszt, § 5—Ullmann, §§ 22 and 26—Bonfils, Nos. 214-215—Despagnet, Nos. 86-89—Pradier-Fodéré, I. Nos. 146-157—Nys, I. pp. 399-401—Rivier, I. § 3—Calvo, I. §§ 81-106—Fiore, I. Nos. 321-331—Martens, I. §§ 65-69.

Important in contradistinction to Indifferent Changes.

§ 76. The existence of International Persons is exposed to the flow of things and times. There is a constant and gradual change in their citizens through deaths and births, emigration and immigration. There is a frequent change in those individuals who are at the head of the States, and there is sometimes a change in the form of their governments, or in their dynasties if they are monarchies. There are sometimes changes in their territories through loss or increase of parts thereof, and there are sometimes changes regarding their independence through partial

[1] See below, § 119.

or total loss of the same. Several of these and other changes in the condition and appearance of International Persons are indifferent to International Law, although they may be of great importance for the inner development of the States concerned and directly or indirectly for international policy. Those changes, on the other hand, which are, or may be, of importance to International Law must be divided into three groups according to their influence upon the character of the State concerned as an International Person. For some of these changes affect a State as an International Person, others do not; again, others extinguish a State as an International Person altogether.

Changes not affecting States as International Persons.

§ 77. A State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory. These changes cannot be said to be indifferent to International Law. Although strictly no notification to and recognition by foreign Powers are necessary, according to the Law of Nations, in case of a change in the headship of a State or in its entire dynasty, or if a monarchy becomes a republic or *vice versa*, no official intercourse is possible between the Powers refusing recognition and the State concerned. Although, further, a State can assume any title it likes, it cannot claim the privileges of rank connected with a title if foreign States refuse recognition. And although, thirdly, a State can dispose according to discretion of parts of its territory and acquire as much territory as it likes, foreign Powers may intervene for the purpose of maintaining a balance of power or on account of other vital interests.

But whatever may be the importance of such changes, they neither affect a State as an Inter-

national Person, nor affect the personal identity of the States concerned. Thus, for instance, France retained her personal identity from the time the Law of Nations came into existence until the present day, although she acquired and lost parts of her territory, changed her dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now, finally as it seems, a republic. All her international rights and duties as an International Person remained the very same throughout the centuries in spite of these important changes in her condition and appearance. Even such loss of territory as contains the reduction of a Great Power to a small Power, or such increase of territory and strength as turns a small State into a Great Power, does not affect a State as an International Person. Thus, although through the events of the years 1859–1861 Sardinia acquired the whole territory of the Italian Peninsula and turned into the Great Power of Italy, she remained one and the same International Person.

Changes affecting States as International Persons.

§ 78. Changes which affect States as International Persons are of different character.

(1) As in a Real Union the member-States of the union, although fully independent, make one International Person,[1] two States which hitherto were separate International Persons are affected in that character by entering into a Real Union. For through that change they appear henceforth together as one and the same International Person. And should this union be dissolved, the member-States are again affected, for they now become again separate International Persons.

[1] See below, § 87, where the character of the Real Union is fully discussed.

(2) Other changes affecting States as International Persons are such changes as involve a partial loss of independence on the part of the States concerned. Many restrictions may be imposed upon States without interfering with their independence proper,[1] but certain restrictions involve inevitably a partial loss of independence. Thus if a hitherto independent State comes under the suzerainty of another State and becomes thereby a half-Sovereign State, its character as an International Person is affected. The same is valid with regard to a hitherto independent State which comes under the protectorate of another State. Again, if several hitherto independent States enter into a Federal State, they transfer a part of their sovereignty to the Federal State and become thereby part-Sovereign States. On the other hand, if a vassal State or a State under protectorate is freed from the suzerainty or protectorate, it is thereby affected as an International Person, because it turns now into a full Sovereign State. And the same is valid with regard to a member-State of a Federal State which leaves the union and gains the condition of a full Sovereign State.

(3) States which become permanently neutralised are thereby also affected in their character as International Persons, although their independence remains untouched. But permanent neutralisation alters the condition of a State so much that it thereby becomes an International Person of a particular kind.

Extinction of International Persons.

§ 79. A State ceases to be an International Person when it ceases to exist. Theoretically such extinction of International Persons is possible through emigration

[1] See below, §§ 126–127, where the different kinds of these restrictions are discussed.

or the perishing of the whole population of a State, or through a permanent anarchy within a State. But it is evident that such cases will hardly ever occur in fact. Practical cases of extinction of States are: Merger of one State into another, annexation after conquest in war, breaking up of a State into several States, and breaking up of a State into parts which are annexed by surrounding States.

By voluntarily merging into another State, a State loses all its independence and becomes a mere part of another. In this way the two Principalities of Hohenzollern-Hechingen and Hohenzollern-Sigmaringen merged in 1850 into Prussia. And the same is the case if a State is annexed by another after conquest in war. In this way the Orange Free State and the South African Republic were absorbed by Great Britain in 1901. An example of the breaking up of a State into different States is the division of the Swiss canton of Basle into Basel-Stadt and Basel-Land in 1833. And an example of the breaking up of a State into parts which are annexed by surrounding States, is the absorption of Poland by Russia, Austria, and Prussia in 1795.

IV

Succession of International Persons

Grotius, II. c. 9 and 10—Pufendorf, VIII. c. 12—Hall, §§ 27-29—Phillimore, I. § 137—Halleck, I. pp. 89-92—Taylor, §§ 164-168—Westlake, I. pp. 68-83—Wharton, I. § 5—Wheaton, §§ 28-32—Bluntschli, §§ 47-50—Hartmann, § 12—Heffter, § 25—Holtzendorff in Holtzendorff, II. pp. 33-47—Liszt, § 23—Ullmann. § 23—Bonfils, Nos. 216-233—Despagnet, Nos. 89-102—Pradier-Fodéré, I. Nos. 156-163—Nys, I. pp. 399-401—Rivier, I. § 3, pp. 69-75 and p. 438—Calvo, I. §§ 99-103—Fiore, I. Nos. 349-366—Martens, I. § 67—Appleton, "Des effets des annexions sur les dettes de l'état démembré ou annexé" (1895)—Huber, "Die Staatensuccession" (1898)—Richards in "The Law Magazine and Review," XXVIII. (1903) pp. 129-141.

Common Doctrine regarding Succession of International Persons.

§ 80. Although there is no unanimity among the writers on International Law with regard to the so-called succession of International Persons, nevertheless the following common doctrine can be stated to exist.

A succession of International Persons occurs when one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition.

Universal succession takes place when one International Person is absorbed by another, either through subjugation or through voluntary merger. And universal succession further takes place when a State breaks up into parts which either become separate International Persons of their own or are annexed by surrounding International Persons.

Partial succession takes place, first, when a part of the territory of an International Person breaks off in a revolt and by winning its independence becomes itself an International Person; secondly, when one International Person acquires a part of the territory of another through cession; thirdly, when a hitherto full Sovereign State loses part of its independence

through entering into a Federal State, or coming under suzerainty or under a protectorate, or when a hitherto not-full Sovereign State becomes full Sovereign; fourthly, when an International Person becomes a member of a Real Union or *vice versa*.

Nobody ever maintained that on the successor devolve all the rights and duties of his predecessor. But after stating that a succession takes place, the respective writers try to educe the consequences and to make out what rights and duties do, and what do not, devolve.

Several writers,[1] however, contest the common doctrine and maintain that a succession of International Persons never takes place. Their argument is that the rights and duties of an International Person disappear with the extinguishing Person or become modified according to the modifications an International Person undergoes through losing part of its sovereignty.

How far Succession actually takes place.

§ 81. If the real facts of life are taken into consideration, the common doctrine cannot be upheld. To say that succession takes place in such and such cases and to make out afterwards what rights and duties devolve, shows a wrong method of dealing with the problem. It is certain that no *general* succession takes place according to the Law of Nations. With the extinguishing International Person extinguish its rights and duties as a person. But it is equally wrong to maintain that no succession whatever occurs. For nobody doubts that certain rights and duties actually and really devolve upon an International Person from its predecessor. And since this devolution takes place through the very fact of one International

[1] See Gareis, pp. 66–70, who discusses the matter with great clearness, and Liszt, § 23.

Person following another in the possession of State territory, there is no doubt that, as far as these devolving rights and duties are concerned, a succession of one International Person into the rights and duties of another really does take place. But no general rule can be laid down concerning all the cases in which a succession takes place. These cases must be discussed singly.

Succession in consequence of Absorption.

§ 82. When a State merges voluntarily into another State or when a State is subjugated by another State, the latter remains one and the same International Person and the former becomes totally extinct as an International Person. No succession takes place, therefore, with regard to rights and duties of the extinct State arising either from the character of the latter as an International Person or from its purely political treaties. Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the State which has concluded it. They are personal treaties, and their natural, legal, and necessary presupposition is the existence of the contracting State. But it is controversial whether treaties of commerce, extradition, and the like, of the extinct State remain valid and therefore a succession takes place. The majority of writers correctly, I think, answer the question in the negative, because such treaties are in the main political.

A real succession takes place, however, first, with regard to such international rights and duties of the extinct State as are locally connected with its land, rivers, main roads, railways, and the like. According to the principle *res transit cum suo onere*, treaties of the extinct State concerning boundary lines, repairing of main roads, navigation on rivers, and the like, remain

valid, and all rights and duties arising from such treaties devolve from the extinct on the absorbing State.

A real succession, secondly, takes place with regard to the fiscal property and the fiscal funds of the extinct State. They both accrue to the absorbing State *ipso facto* by the absorption of the extinct State.[1] But the debts of the extinct State must, on the other hand, be taken over by the absorbing State also.[2] The private creditor of an extinct State certainly acquires no right by International Law against the absorbing State, since the Law of Nations is a law between States only and exclusively. But if he is a foreigner, the right of protection due to his home State enables the latter to exercise pressure upon the absorbing State for the purpose of making it fulfil its international duty to take over the debts of the extinct State. Some jurists[3] go so far as to maintain that the succeeding State must take over the debts of the extinct State, even when they are higher than the value of the accrued fiscal property and fiscal funds. But I doubt whether in such cases the practice of the States would follow that opinion. On the other hand, a State which has subjugated

[1] This was recognised by the High Court of Justice in 1866 in the case of the United States *v.* Prioleau. See Snow, Cases on International Law (1902), p. 85.

[2] This is almost generally recognised by the writers on International Law and by the practice of the States. (See Huber, p. 156 and p. 282, note 449.) The Report of the Transvaal Concessions Commission (see British State Papers, South Africa, 1901, Cd. 623), although it declares (p. 7) that "it is clear that a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist," nevertheless agrees that "the modern usage of nations has tended in the acknowledgment of such contracts." It may, however, safely be maintained that not a usage, but a real rule of International Law, based on custom, is in existence with regard to this point. (See Hall, § 29, and Westlake in The Law Quarterly Review, XVII. (1901), pp. 392–401, and now Westlake, I. pp. 74–82.)

[3] See Martens, I. § 67; Heffter, § 25; Huber, p. 158.

another would be obliged [1] to take over even such obligations as have been incurred by the annexed State for the immediate purpose of the war which led to its subjugation.[2]

Succession in consequence of Dismemberment.

§ 83. When a State breaks off into fragments which become States and International Persons themselves, or which are annexed by surrounding States, it becomes extinct as an International Person, and the same rules are valid as regards the case of absorption of one State by another. A difficulty is, however, created when the territory of the extinct State is absorbed by several States. Succession actually takes place here too, first, with regard to the international rights and duties locally connected with those parts of the territory which the respective States have absorbed. Succession, secondly, takes place with regard to the fiscal property and the fiscal funds which each of the several absorbing States finds on the part of the territory it absorbs. And the debts of the extinct State must be taken over. But the case is complicated through the fact that there are several successors to the fiscal property and funds, and the only rule which can be laid down is that proportionate parts of the debts must be taken over by the different successors.

§ 84. When in consequence of war or otherwise

[1] See the Report of the Transvaal Concession Commission, p. 9, which maintains the contrary. Westlake (I. p. 78) adopts the reasoning of this report, but his arguments are not decisive. The lending of money to a belligerent under ordinary mercantile conditions is not prohibited by International Law, although the carriage of such funds in cash on neutral vessels to the enemy falls under the category of carriage of contraband, and can be punished by the belligerents. (See below, Vol. II. § 352.)

[2] The question how far concessions granted by a subjugated State to a private individual or to a company must be upheld by the subjugating State, is difficult to answer in its generality. The merits of each case would seem to have to be taken into consideration. (See Westlake, I. p. 82.)

Succession in case of Separation or Cession.

one State cedes a part of its territory to another, or when a part of the territory of a State breaks off and becomes a State and an International Person of its own, succession takes place with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded or broken off, and with regard to the fiscal property found on that part of the territory. It would only be just, if the successor had to take over a corresponding part of the debt of its predecessor, but no rule of International Law concerning this point can be said to exist, although many treaties have stipulated a devolution of a part of the debt of the predecessor upon the successor.[1] Thus, for instance, arts. 9, 33, 42 of the Treaty of Berlin[2] of 1878 stipulate that Bulgaria, Montenegro, and Servia should take over a part of the Turkish debt.

[1] Many writers, however, maintain that there is such a rule of International Law. (See Huber, Nos. 125–135 and 205, where the respective treaties are enumerated.)

[2] See Martens, N.R.G. 2nd ser III. p. 449.

V

Composite International Persons

Pufendorf, VII. c. 5—Hall, § 4—Westlake, I. pp. 31–37—Phillimore, I. §§ 71–74, 102–105—Twiss, I. §§ 37–60—Halleck, I. pp. 70–74—Taylor, § 120–130—Wheaton, §§ 39–51—Hartmann, § 70—Heffter §§ 20–21—Holtzendorff in Holtzendorff, II. pp. 118–141—Liszt, § 6—Ullmann, §§ 11–15—Bonfils, Nos. 165–174—Despagnet, Nos. 109–126—Pradier-Fodéré, I. Nos. 117–123—Nys, I. pp. 367–378—Rivier, I. §§ 5–6—Calvo, I. §§ 44–61—Fiore, I. Nos. 335–339—Martens, I. §§ 56–59—Pufendorf, "De systematibus civitatum' (1675)—Jellinek, "Die Lehre von den Staatenverbindungen" (1882)—Borel, "Etude sur la souveraineté de l'Etat fédératif" (1886)—Brie, "Theorie der Staatenverbindungen" (1886)—Hart, "Introduction to the Study of Federal Government" in "Harvard Historical Monographs" (1891; comprises an excellent bibliography)—Le Fur, "Etat fédéral et confédération d'Etats" (1896).

Real and apparent Composite International Persons.

§ 85. International Persons are as a rule single Sovereign States. In such single States there is one central political authority as Government which represents the State, within its borders as well as without, in the international intercourse with other International Persons. Such single States may be called *simple* International Persons. And a State remains a simple International Person, although it may grant so much internal independence to outlying parts of its territory that these parts become in a sense States themselves, and thus the whole becomes an Incorporate Union. Great Britain is a simple International Person, although the Dominion of Canada and the Commonwealth of Australia, as well as their member-States, are now States of their own, because Great Britain is alone Sovereign and represents exclusively the British Empire within the Family of Nations.

Historical events, however, have created, in addition to the simple International Persons, *com-*

posite International Persons. A composite International Person is in existence when two or more Sovereign States are linked together in such a way that they take up their position within the Family of Nations either exclusively or at least to a great extent as one single International Person. History has produced two different kinds of such composite International Persons—namely, Real Unions and Federal States. In contradistinction to Real Unions and Federal States, a so-called Personal Union and the union of so-called Confederated States are not International Persons.[1]

States in Personal Union.

§ 86. A Personal Union is in existence when two Sovereign States and separate International Persons are linked together through the accidental fact that they have the same individual as monarch. Thus a Personal Union existed from 1714 to 1837 between Great Britain and Hanover, and from 1815 to 1890 between the Netherlands and Luxemburg. The only Personal Union existing at present is that between Belgium and the Congo Free State since 1885. A Personal Union is not, and is in no point treated as though it were, an International Person, and its two Sovereign member-States remain separate International Persons. Theoretically it is even possible that they make war against each other, although practically this will never occur. If, as sometimes happens, they are represented by one and the same individual as diplomatic envoy, such individual is the

[1] I cannot agree with Westlake (I. p. 37) that "the space which some writers devote to the distinctions between the different kinds of union between States" is "disproportioned . . . to their international importance." Very important questions are connected with these distinctions. The question, for instance, whether a diplomatic envoy sent by Bavaria to this country must be granted the privileges due to a foreign diplomatic envoy depends upon the question whether Bavaria is an International Person in spite of her being a member-State of the German Empire.

envoy of both States at the same time, but not the envoy of the Personal Union.

States in Real Union.

§ 87. A Real Union is in existence when two Sovereign States are by an international treaty, recognised by other Powers, linked together for ever under the same monarch, so that they make one and the same International Person. A Real Union is not a State of its own, but merely a union of two full Sovereign States which together make one single but composite International Person. They form a compound Power, and are by the treaty of union prevented from making war against each other. On the other hand, they cannot make war separately against a foreign Power, nor can war be made against one of them separately. They can enter into separate treaties of commerce, extradition, and the like, but it is always the Union which concludes such treaties for the separate States, as they separately are not International Persons. It is, for instance, Austria-Hungary which concludes an international treaty of extradition between Hungary and a foreign Power. Real Unions at present in existence outside the German Empire are those of Austria-Hungary and Sweden-Norway.

Austria-Hungary became a Real Union in 1723. In 1849, Hungary was united with Austria, but in 1867 Hungary became again a separate Sovereign State and the Real Union was re-established. Their army, navy, and foreign ministry are united. The Emperor-king declares war, makes peace, concludes alliances and other treaties, and sends and receives the same diplomatic envoys for both States.

Sweden-Norway became a Real Union[2] in 1814.

[1] There is a Real Union between Saxe-Coburg and Saxe-Gotha within the German Empire.

[2] This is not universally recog-

The King declares war, makes peace, concludes alliances and other treaties, and sends and receives the same diplomatic envoys for both States. The Foreign Secretary of Sweden manages at the same time the foreign affairs of Norway. Both States have, however, in spite of the fact that they make one and the same International Person, different commercial and naval flags; and it is intended in future to divide also their consular service.

Confederated States (Staatenbund).

§ 88. Confederated States (Staatenbund) are a number of full Sovereign States linked together for the maintenance of their external and internal independence, by a recognised international treaty into a union with organs of its own, which are vested with a certain power over the member-States but not over the citizens of these States. Such a union of Confederated States is no more a State of its own than a Real Union is; it is merely an International Confederation of States, a society of international character, since the member-States remain full Sovereign States and separate International Persons. Consequently, the union of Confederated States is not an International Person, although it is for some parts so treated on account of its representing the compound power of the full Sovereign member-States. The chief and sometimes the only organ of the union is a Diet, where the member-States are represented through diplomatic envoys. The power vested in the Diet is an International Power which does not in the least affect the full sovereignty of the member-States. That power is essentially nothing else than the right of the body of the members to make war

nised. Phillimore, I. § 74, maintains that there is a Personal Union between Sweden and Norway, and Twiss, I. § 40, calls it a Federal Union.

against such a member as will not submit to those commandments of the Diet which are in accordance with the Treaty of Confederation, in all other cases war between the member-States being prohibited.

History has shown that Confederated States represent an organisation which in the long run gives very little satisfaction. It is for that reason that the three important unions of Confederated States of modern times—namely, the United States of America, the German, and the Swiss Confederation—have turned into unions of Federal States. Notable historic Confederations are those of the Netherlands from 1580 to 1795, the United States of America from 1778 to 1787, Germany from 1815 to 1866, Switzerland from 1291 to 1798 and 1815 to 1848, and the Confederation of the Rhine (Rheinbund) from 1806 to 1813. At present there is only one union of Confederated States, if any, in existence—namely, the major Republic of Central America,[1] consisting of the three full Sovereign States of Honduras, Nicaragua, and San Salvador.

Federal States (Bundesstaaten).

§ 89. A Federal State[2] is a perpetual union of several Sovereign States which has organs of its own and is invested with a power, not only over the member-States, but also over their citizens. The union is based, first, on an international treaty of the member-States, and, secondly, on a subsequently accepted constitution of the Federal State. A Federal State is said to be a real State side by side with its member-States because its organs have a

[1] This union dates from 1895. See R.G. II. p. 568, where a translation of the Treaty of Union is given. (See also R.G. III. p. 599 and IV. p. 146.)

[2] The distinction between Confederated States and a Federal State is not at all universally recognised, and the terminology is consequently not at all the same with all writers on International Law.

direct power over the citizens of these member-States. This power was established as a characteristic distinction of a Federal State from Confederated States by American [1] jurists of the eighteenth century, and Kent as well as Story, the two later authorities on the Constitutional Law of the United States, adopted this distinction, which is indeed kept up until to-day by the majority of writers on politics. Now if a Federal State is recognised as a State of its own, side by side with its member-States, it is evident that sovereignty must be divided between the Federal State on the one hand, and, on the other, the member-States. This division is made in this way, that the competence over one part of the objects for which a State is in existence is handed over to the Federal State, whereas the competence over the other part remains with the member-States. Within its competence the Federal State can make laws which bind the citizens of the member-States directly without any interference of these member-States. On the other hand, the member-States are totally independent as far as *their* competence reaches.

For International Law this division of competence is only of interest in so far as it concerns the competence in *international* matters. Since it is always

[1] When in 1787 the draft of the new Constitution of the United States, which had hitherto been Confederated States only, was under consideration by the Congress at Philadelphia, three members of the Congress—namely, Alexander Hamilton, James Madison, and John Jay—made up their minds to write newspaper articles on the draft Constitution with the intention of enlightening the nation which had to vote for the draft. For this purpose they divided the different points among themselves and treated them separately. All these articles, which were not signed with the names of their authors, appeared under the common title "The Federalist." They were later on collected into book-form and have been edited several times. It is especially Nos. 15 and 16 of "The Federalist" which establish the difference between Confederated States and a Federal State in the way mentioned in the text above.

the Federal State which is competent to declare war, make peace, conclude treaties of alliance and other political treaties, and send and receive diplomatic envoys, whereas no member-State can of itself declare war against a foreign State, make peace, conclude alliances and other political treaties, the Federal State, if recognised, is certainly an International Person of its own, with all the rights and duties of a sovereign member of the Family of Nations. On the other hand, the international position of the member-States is not so clear. It is frequently maintained that they have totally lost their position within the Family of Nations. But this opinion cannot stand if compared with the actual facts. Thus, the member-States of the Federal State of Germany have retained their competence to send and receive diplomatic envoys, not only in intercourse with one another, but also with foreign States. Further, the reigning monarchs of these member-States are still treated by the practice of the States as heads of Sovereign States, a fact without legal basis if these States were no longer International Persons. Thirdly, the member-States of Germany as well as of Switzerland have retained their competence to conclude international treaties between themselves without the consent of the Federal State, and they have also retained the competence to conclude international treaties with foreign States as regards matters of minor interest. If these facts are taken into consideration, one is obliged to acknowledge that the member-States of a Federal State can be International Persons in a degree. Full subjects of International Law, International Persons with all the rights and duties regularly connected with the membership of the Family of Nations, they certainly cannot be. Their

position, if any, within this circle is overshadowed by their Federal State, they are part-Sovereign States, and they are, consequently, International Persons for some parts only.

But it happens frequently that a Federal State assumes *in every way* the external representation of its member-States, so that, so far as international relations are concerned, the member-States do not make an appearance at all. This is the case with the United States of America and all those other American Federal States whose Constitution is formed according to the model of that of the United States. Here the member-States are sovereign too, but only with regard to *internal*[1] affairs. All their external sovereignty being absorbed by the Federal State, it is certainly a fact that they are not International Persons at all so long as this condition of things lasts.

This being so, two classes of Federal States must be distinguished according to whether their member-States are or are not International Persons, although Federal States are in any case composite International Persons. And whenever a Federal State comes into existence which leaves the member-States for some parts International Persons, the recognition granted to it by foreign States must include their readiness to recognise for the future, on the one hand, the body of the member-States, the Federal State, as one composite International Person regarding all important matters, and, on the other hand, the single member-States as International Persons with regard to less important matters and side by side

[1] The Courts of the United States of America have always upheld the theory that the United States are sovereign as to all powers of government actually surrendered, whereas each member-State is sovereign as to all powers reserved. (See Merriam, History of the Theory of Sovereignty since Rousseau (1900), p. 163.)

with the Federal State. That such a condition of things is abnormal and illogical cannot be denied, but the very existence of a Federal State besides the member-States is quite as abnormal and illogical.

The Federal States in existence are the following :— The United States of America since 1787, Switzerland since 1848, Germany since 1871, Mexico since 1857, Argentine since 1860, Brazil since 1891, Venezuela since 1893.

VI

Vassal States

Hall, § 4—Westlake, I. pp. 25-27—Lawrence, § 50—Phillimore, I. §§ 85-99—Twiss, I. §§ 22-36, 61-73—Taylor, §§ 140-144—Wheaton, § 37—Bluntschli, §§ 76-77—Hartmann, § 16—Heffter, §§ 19 and 22—Holtzendorff in Holtzendorff, II. pp. 98-117—Liszt, § 6—Ullmann, § 16—Gareis, § 15—Bonfils, Nos. 188-190—Despagnet, Nos. 127-129—Pradier-Fodéré, I. Nos. 109-112—Nys, I. pp. 357-364—Rivier, I. § 4—Calvo, I. §§ 66-72—Fiore, I. No. 341—Martens, I. §§ 60-61—Stubbs, "Suzerainty" (1884)—Baty, "International Law in South Africa" (1900), pp. 48-68—Boghitchévitch, "Halbsouveränität" (1903).

The Union between Suzerain and Vassal State.

§ 90. The union and the relations between a Suzerain and its Vassal State create much difficulty in the science of the Law of Nations. As both are separate States, a union of States they certainly make, but it would be wrong to say that the Suzerain State is, like the Real Union of States or the Federal State, a composite International Person. And it would be equally wrong to maintain either that a Vassal State can be in no way a separate International Person of its own, or that it is an International Person of the same kind as any other State. What makes the matter so complicated, is the fact that a general rule regarding the relation between the

suzerain and vassal, and, further regarding the position, if any, of the vassal within the Family of Nations, cannot be laid down, as everything depends upon the special case. What can and must be said is that there are some States in existence which, although they are independent of another State as regards their internal affairs, are as regards their international affairs either absolutely or for the most part dependent upon another State. They are called half-Sovereign[1] States because they are sovereign within their borders but not without. The full Sovereign State upon which such half-Sovereign States are either absolutely or for the most part internationally dependent, is called the Suzerain State.

Suzerainty is a term which originally was used for the relation between the feudal lord and his vassal; the lord was said to be the suzerain of the vassal, and at that time suzerainty was a term of Constitutional Law. With the disappearance of the feudal system, suzerainty of this kind likewise disappeared. The modern suzerainty scarcely contains rights of the Suzerain State over the Vassal State which could be called constitutional rights. The rights of the Suzerain State over the Vassal are principally international rights only, of whatever they may consist. Suzerainty is by no means sovereignty. If it were, the Vassal State could not be Sovereign in its domestic affairs and could never have any international relations whatever of its own. And why should suzerainty be distinguished from sovereignty if it were a term synonymous with sovereignty? One may correctly maintain that *suzerainty is a kind of international*

[1] In contradistinction to the States which are under suzerainty or protectorate, and which are commonly called *half*-Sovereign States, I call member-States of a Federal State *part*-Sovereign States.

guardianship, since the Vassal State is either absolutely or mainly represented internationally by the Suzerain State.

International Position of Vassal States.

§ 91. The fact that the relation between the suzerain and the vassal depends always upon the special case, excludes the possibility of laying down a general rule as regards the position of Vassal States within the Family of Nations. It is certain that a Vassal State as such need not have any position whatever within the Family of Nations. In every case in which a Vassal State has absolutely no relation whatever with other States, since the suzerain absorbs these relations entirely, such vassal remains nevertheless a half-Sovereign State on account of its internal independence, but it has no [1] position whatever within the Family of Nations, and consequently is for no part whatever an International Person and a subject of International Law. Yet instances can be given which demonstrate that Vassal States can have some small and subordinate position within that family, and that they must in consequence thereof in some few points be considered as International Persons. Thus Egypt can conclude commercial and postal treaties with foreign States without the consent of suzerain Turkey, and Bulgaria can conclude treaties regarding railways, post, and the like. Thus, further, Bulgaria as well as Egypt can send and receive consuls as diplomatic agents. Thus, thirdly, the former South African Republic, although in the opinion of Great Britain under her suzerainty, could conclude all kinds of treaties with

[1] This is the position of the Indian Vassal States of Great Britain, which have no international relations and communications whatever either between themselves or with foreign States. (See Westlake, Chapters, pp. 211–219, and now Westlake, I. pp. 41–43.)

other States, provided Great Britain did not interpose a *veto* within six months after receiving a copy of the draft treaty, and was absolutely independent in concluding treaties with the neighbouring Orange Free State. Again, Egypt possesses since 1898 together with Great Britain *condominium*[1] over the Soudan, which means that both exercise conjointly sovereignty over this territory. Although Vassal States have not the right to make war independently of their suzerain, Bulgaria nevertheless fought a war against the full-Sovereign Servia in 1885, and Egypt conquered conjointly with Great Britain the Soudan in 1898.

How could all these and other facts be explained, if Vassal States could never for some small part be International Persons?

Side by side with these facts stand, of course, other facts which show that for the most part the Vassal State, even if it has some small position of its own within the Family of Nations, is considered a mere portion of the Suzerain State. Thus all international treaties concluded by the Suzerain State are *ipso facto* concluded for the vassal, if an exception is not expressly mentioned or self-evident. Thus, again, war of the suzerain is *ipso facto* war of the vassal. Thus, thirdly, the suzerain bears within certain limits a responsibility for actions of the Vassal State.

Under these circumstances it is generally admitted that the conception of suzerainty lacks juridical precision, and experience teaches that Vassal States do not remain half-Sovereign for long. They either shake off suzerainty and turn into full-Sovereign States, as Roumania, Servia, and Montenegro did in 1878, or they lose their half-sovereignty through annexation, as in the case of the South African

[1] See below, § 171.

Republic in 1901, or merger, as the half-Sovereign Seignory of Kniephausen in Germany merged in 1854 into its suzerain Oldenburg.

Vassal States of importance which are for some parts International Persons are, at present, Bulgaria,[1] Egypt,[2] and Crete.[3] They are all three under Turkish suzerainty, although Egypt is actually under the administration of Great Britain.

VII

States under Protectorate

Hall, §§ 4 and 38*—Westlake, I. pp. 22–24—Lawrence, § 50—Phillimore, I. 75–82—Twiss, I. §§ 22–36—Taylor, §§ 134–139—Wheaton, §§ 34–36—Bluntschli, § 78—Hartmann, § 9—Heffter, §§ 19 and 22—Holtzendorff in Holtzendorff, II. pp. 98–117—Gareis, § 15—Liszt, § 6—Ullmann, § 17—Bonfils, Nos. 176–187—Despagnet, Nos. 130–136—Pradier-Fodéré, I. Nos. 94–108—Nys, I. pp. 364–366—Rivier, I. § 4—Calvo, I. §§ 62–65—Fiore, I. § 341—Martens, I. §§ 60–61—Heilborn, "Das völkerrechtliche Protectorat" (1891)—Engelhardt, "Les Protectorats, etc." (1896)—Gairal, "Le protectorat international" (1896)—Despagnet, "Essai sur les protectorats" (1896)—Boghitchévitch, "Halbsouveränität" (1903).

Conception of Protectorate.

§ 92. Legally and materially different from suzerainty is the relation of protectorate between two States. It happens that a weak State surrenders itself by treaty into the protection of a strong and mighty State in such a way that it transfers the management [4] of all its more important international affairs to the protecting State. Through such treaty

[1] See Holland, The European Concert in the Eastern Question (1885), pp. 277–307.

[2] See Holland, The European Concert in the Eastern Question (1885), pp. 89–205; Grünau, Die staats- und völkerrechtliche Stellung Aegyptens (1903); Cocheris, Situation internationale de l'Egypte et du Soudan (1903). The last two books ought to be read with caution, since they are deeply tinged with Anglophobia.

[3] See Streit in R.G. X. (1903), pp. 399–417.

[4] A treaty of protectorate must not be confounded with a treaty of protection in which one or more strong States promise to protect a weak State without absorbing the international relations of the latter.

an international union is called into existence between the two States, and the relation between them is called protectorate. The protecting State is internationally the superior of the protected State, the latter has with the loss of the management of its more important international affairs lost its full sovereignty and is henceforth only a half-Sovereign State. Protectorate is, however, a conception which, just like suzerainty, lacks exact juristic precision, as its real meaning depends very much upon the special case. Generally speaking, protectorate may, again like suzerainty, be called *a kind of international guardianship*.

International position of States under Protectorate.

§ 93. The position of a State under protectorate within the Family of Nations cannot be defined by a general rule, since it is the treaty of protectorate which indirectly specialises it by enumerating the reciprocal rights and duties of the protecting and the protected State. Each case must therefore be treated according to its own merits. Thus the question whether the protected State can conclude certain international treaties and can send and receive diplomatic envoys, as well as other questions, must be decided from the basis of the individual treaty of protectorate. In any case, recognition of the protectorate on the part of third States is necessary to enable the superior State to represent the protected State internationally. But it is characteristic of the protectorate, in contradistinction to suzerainty, that the protected State always has and retains for some parts a position of its own within the Family of Nations, and that it is always for some parts an International Person and a subject of International Law. It is never in any respect considered a mere portion of the superior State. It is, therefore, not

necessarily a party in a war[1] of the superior State against a third, and treaties concluded by the superior State are not *ipso facto* concluded for the protected State. And, lastly, it can at the same time be under the protectorate of two different States, which, of course, must exercise the protectorate conjointly.

In Europe there are at present only two very small States under protectorate—namely, the republic of Andorra, under the joint protectorate of France and Spain,[2] and the republic of San Marino, an enclosure of Italy, which was formerly under the protectorate of the Papal States and is now under that of Italy. The Principality of Monaco, which was under the protectorate at first of Spain until 1693, afterwards of France until 1815, and then of Sardinia, has now through custom become a full Sovereign State, since Italy has never[3] exercised the protectorate. The Ionian Islands, which were under British protectorate since 1815, merged into the Kingdom of Greece in 1863.

Protectorates outside the Family of Nations.

§ 94. Outside Europe there are numerous States under the protectorate of European States, but all of them are non-Christian States of such a civilisation as would not admit them as full members of the Family of Nations, apart from the protectorate under which they are now. And it may therefore be questioned whether they have any real position within the Family of Nations at all. As the protectorate over them is recognised by third States, the latter are legally prevented from exercising any political influence in these protected States, and, failing special treaty rights, they have no right to

[1] This was recognised by the English Prize Courts during the Crimean War with regard to the Ionian Islands, which were then still under British protectorate. (See Phillimore, I. § 77.)

[2] This protectorate is exercised for Spain by the Bishop of Urgel.

[3] This is a clear case of *desuetudo*.

interfere if the protecting State annexes the protected State and makes it a mere colony of its own, as, for instance, France did with Madagascar in 1896. Protectorates of this kind are actually nothing else than the first step to annexation.[1] Since they are based on treaties with real States, they cannot in every way be compared with the so-called protectorates over African tribes which European States acquire through a treaty with the chiefs of these tribes, and by which the respective territory is preserved for future occupation on the part of the so-called protector.[2] But actually they always lead to annexation, if the protected State does not succeed in shaking off by force the protectorate, as Abyssinia did in 1896 when she shook off the pretended Italian protectorate.

VIII

Neutralised States

Westlake, I. pp. 27-30—Lawrence, §§ 52 and 246—Taylor, § 133—Bluntschli, § 745—Heffter, § 145—Holtzendorff in Holtzendorff, II. pp. 643-646—Gareis, § 15—Liszt, § 6—Ullmann, § 18—Bonfils, Nos. 348-369—Despagnet, Nos. 137-146—Pradier-Fodéré, II. Nos. 1001-1015—Nys, I. pp. 379-398—Rivier, I, § 7—Calvo, IV, §§ 2596-2610—Piccioni's "Essai sur la neutralité perpétuelle" (2nd ed. 1902)—Regnault, "Des effets de la neutralite perpétuelle" (1898)—Tswettcoff, "De la situation juridique des états neutralisés" (1895).

Conception of Neutralised States.

§ 95. A neutralised State is a State whose independence and integrity are for all the future guaranteed by an international convention of the Powers, under the condition that such State binds itself never to take up arms against any other State except for

[1] Examples of such non-Christian States under protectorate are Zanzibar under Great Britain and Tunis under France.

[2] See below, § 226.

defence against attack, and never to enter into such international obligations as could indirectly drag it into war. The reason why a State asks or consents to become neutralised is that it is a weak State and does not want an active part in international politics, being exclusively devoted to peaceable developments of welfare. The reason why the Powers neutralise a weak State may be a different one in different cases. The chief reasons have been hitherto the balance of power in Europe and the interest in keeping up a weak State as a so-called Buffer-State between the territories of Great Powers.

Not to be confounded with neutralisation of States is neutralisation of parts of States,[1] of rivers, canals, and the like, which has the effect that war cannot there be made and prepared.

Act and Condition of Neutralisation.

§ 96. Without thereby becoming a neutralised State, every State can conclude a treaty with another State and undertake the obligation to remain neutral if such other State enters upon war. The act through which a State becomes a neutralised State for all the future is always an international treaty of the Powers between themselves and between the State concerned, by which treaty the Powers guarantee collectively the independence and integrity of the latter State. If all the Great Powers do not take part in the treaty, those which do not take part in it must at least give their tacit consent by taking up an attitude which shows that they agree to the neutralisation, although they do not guarantee it. In guaranteeing the permanent neutrality of a State the contracting Powers enter into the obligation not to violate on their part the independence of the neutral State and to prevent other States from such violation. But the neutral

[1] See below, vol. II. § 72.

State becomes, apart from the guaranty, in no way dependent upon the guarantors, and the latter gain no influence whatever over the neutral State in matters which have nothing to do with the guaranty.

The condition of the neutralisation is that the neutralised State abstains from any hostile action, and further from any international engagement which could indirectly [1] drag it into hostilities against any other State.

International position of Neutralised States.

§ 97. Since a neutralised State is under the obligation not to make war against any other State, except when attacked, and not to conclude treaties of alliance, guaranty, and the like, it is frequently maintained that neutralised States are part-Sovereign only and not International Persons of the same position within the Family of Nations as other States. This opinion has, however, no basis if the real facts and conditions of the neutralisation are taken into consideration. If sovereignty is nothing else than supreme authority, a neutralised State is as fully sovereign as any not neutralised State. It is entirely independent outside as well as inside its borders, since independence does not at all mean boundless liberty of action.[2] Nobody maintains that the guaranteed protection of the independence and integrity of the neutralised State places this State under the protectorate or any other kind of authority of the guarantors. And the condition of the neutralisation to abstain from war, treaties of alliance, and the like, contains restrictions which do in no way

[1] It was, therefore, impossible for Belgium, which was a party to the treaty that neutralised Luxemburg in 1867, to take part in the guarantee of this neutralisation. See Article 2 of the Treaty of London of May 11, 1867: "sous la sanction de la garantie collective des puissances signataires, à l'exception de la Belgique, qui est elle-même un état neutre."

[2] See below, § 126.

destroy the full sovereignty of the neutralised State. Such condition has the consequence only that the neutralised State exposes itself to an intervention by right, and loses the guaranteed protection in case it commits hostilities against another State, enters into a treaty of alliance, and the like. Just as a not-neutralised State which has concluded treaties of arbitration with other States to settle all conflicts between one another by arbitration has not lost part of its sovereignty because it has thereby to abstain from arms, so a neutralised State has not lost a part of its sovereignty through entering into the obligation to abstain from hostilities and treaties of alliance. This becomes quite apparent when it is taken into consideration that a neutralised State not only can conclude treaties of all kinds, except treaties of alliance, guarantee, and the like, but can also have an army and navy[1] and can build fortresses, as long as this is done with the purpose of preparing defence only. Neutralisation does not even exercise an influence upon the rank of a State. Belgium, Switzerland, and Luxemburg are States with royal honours and do not rank behind Great Britain or any other of the guarantors of their neutralisation. Nor is it denied that neutralised States, in spite of their weakness and comparative unimportance, can nevertheless play an important part within the Family of Nations. Although she has no voice where history is made by the sword, Switzerland has exercised great influence with regard to several points of progress in International Law. Thus the Geneva Convention owes its existence to

[1] The case of Luxemburg, which became neutralised under the condition not to keep an armed force with the exception of a police, is an anomaly.

the initiative of Switzerland. The fact that a permanently neutralised State is in many questions a disinterested party makes such State fit to take the initiative where action by a Great Power would create suspicion and reservedness on the part of other Powers.

But neutralised States are and must always be an exception. The Family and the Law of Nations could not be what they are if ever the number of neutralised States should be much increased. It is neither in the interest of the Law of Nations, nor in that of humanity, that all the small States should become neutralised, as thereby the political influence of the few Great Powers would become still greater than it already is. The four neutralised States—namely, Switzerland, Belgium, Luxemburg, and the Congo State—are a product of the nineteenth century only, and it remains to be seen whether neutralisation can stand the test of history.[1]

Switzerland.

§ 98. The Swiss Confederation,[2] which was recognised by the Westphalian Peace of 1648, has pursued a traditional policy of neutrality since that time. During the French Revolution and the Napoleonic wars, however, she did not succeed in keeping up her neutrality. French intervention brought about in 1803 a new Constitution, according to which the single cantons ceased to be independent States and Switzerland turned from a Confederation of States

[1] The fate of the Republic of Cracow, which was created an independent State under the joint protection of Austria, Prussia, and Russia by the Vienna Congress in 1815, and permanently neutralised, but which was annexed by Austria in 1846 (see Nys, I. pp. 383–385), cannot be quoted as an example that neutralised States have no durability. This annexation was only the last act in the drama of the absorption of Poland by her neighbours.

[2] See Schweizer, Geschichte der schweizerischen Neutralität (1895).

into the simple State of the Helvetic Republic, which was, moreover, through a treaty of alliance linked to France. It was not till 1813 that Switzerland became again a Confederation of States, and not till 1815 that she succeeded in becoming permanently neutralised. On March 20, 1815, at the Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, and Russia signed the declaration in which the permanent neutrality of Switzerland was recognised and collectively guaranteed, and on May 27, 1815, Switzerland acceded to this declaration. Article 84 of the Act of the Vienna Congress confirmed this declaration, and an Act, dated November 20, 1815, of the Powers assembled at Paris after the final defeat of Napoleon recognised it again.[1] Since that time Switzerland has always succeeded in keeping up her neutrality. She has built fortresses and organised a strong army for that purpose, and in January 1871, during the Franco-German War, she disarmed a French army of more than 80,000 men who had taken refuge on her territory, and guarded them till after the war.

Belgium.

§ 99. Belgium[2] became neutralised from the moment she was recognised as an independent State in 1831. The Treaty of London, signed on November 15, 1831, by Great Britain, Austria, Belgium, France, Prussia, and Russia, stipulates in its article 7 at the same time the independence and the permanent neutrality of Belgium, and in its article 25 the guaranty of the signatory five Great Powers.[3] And the guaranty was renewed in article 1 of the Treaty of London of April 19, 1839,[4] to which the same

[1] See Martens, N.R., II. pp. 157, 173, 419, 740.

[2] See Descamps, La Neutralité de la Belgique, 1902.

[3] See Martens, N.R., XI. pp. 394 and 404.

[4] See Martens, N.R. XVI. p. 790.

Powers are parties, and which is the final treaty concerning the separation of Belgium from the Netherlands.

Belgium has, just like Switzerland, also succeeded in keeping up her neutrality. She, too, has built fortresses and possesses a strong army.

Luxemburg.

§ 100. The Grand Duchy of Luxemburg[1] was since 1815 in personal union with the Netherlands, but at the same time a member of the Germanic Confederation, and Prussia had since 1856 the right to keep troops in the fortress of Luxemburg. In 1866 the Germanic Confederation came to an end, and Napoleon III. made efforts to acquire Luxemburg by purchase from the King of Holland, who was at the same time Grand Duke of Luxemburg. As Prussia objected to this, it seemed advisable to the Powers to neutralise Luxemburg. A Conference met in London, at which Great Britain, Austria, Belgium, France, Holland and Luxemburg, Italy, Prussia, and Russia were represented, and on May 11, 1867, a treaty was signed for the purpose of the neutralisation, which is stipulated and collectively guaranteed by all the signatory Powers, Belgium as a neutralised State herself excepted, by article 2.[2]

The neutralisation took place, however, under the abnormal condition that Luxemburg is not allowed to keep any armed force, with the exception of a police for the maintenance of safety and order, nor to possess any fortresses. Under these circumstances Luxemburg herself can do nothing for the defence of her neutrality, as Belgium and Switzerland can.

§ 101. The Congo Free State,[3] which was re-

[1] See Wompach, Le Luxembourg neutre (1900).

[2] See Martens, N.R.G. XVIII. p. 448.

[3] Moynier, La fondation de l'Etat indépendant du Congo (1887); Hall, § 26; Westlake, I. p. 30.

The Congo Free State.

cognised as an independent State by the Berlin Congo Conference[1] of 1884–1885, is a permanently neutralised State since 1885, but its neutralisation is imperfect in so far as it is not guaranteed by the Powers. This fact is explained by the circumstances under which this State attained its neutralisation. Article 10 of the General Act of the Congo Conference of Berlin stipulates that the signatory Powers shall respect the neutrality of any territory within the Congo district, provided the Power then or hereafter in possession of the territory proclaims its neutrality. Accordingly, when the Congo Free State was recognised by the Congress of Berlin, the King of the Belgians, as the sovereign of the Congo State, declared[2] it permanently neutral, and this declaration was notified to and recognised by the Powers. Since the Congo Conference did not guarantee the neutrality of the territories within the Congo district, the neutralisation of the Congo Free State is not guaranteed either.

IX

Non-Christian States

Westlake, I. p. 40—Phillimore, I. §§ 27–33—Bluntschli, §§ 1–16—Heffter, § 7—Gareis, § 10—Rivier, I. pp. 13–18—Bonfils, No. 40—Martens, § 41—Nys, I. pp. 122–125—Westlake, Chapters, pp. 114–143.

No essential difference between Christian and other States.

§ 102. It will be remembered from the previous discussion of the dominion[3] of the Law of Nations that this dominion extends beyond the Christian and includes now the Mahometan State of Turkey and

[1] See Protocol 9 of that Conference in Martens, N.R.G., 2nd ser. X. p. 353.

[2] See Martens, N.R.G., 2nd ser. XVI. p. 585.

[3] See above, § 28.

the Buddhistic State of Japan. As all full-Sovereign International Persons are equal to one another, no essential difference exists within the Family of Nations between Christian and non-Christian States. That foreigners residing in Turkey are still under the exclusive jurisdiction of their consuls, is an anomaly based on a restriction on territorial supremacy arising partly from custom and partly from treaties. If Turkey could ever succeed, as Japan did, in introducing such reforms as would create confidence in the impartiality of her Courts of Justice, this restriction would certainly be abolished.

International position of non-Christian States besides Turkey and Japan.

§ 103. Doubtful is the position of all non-Christian States except Turkey and Japan, such as China, Korea, Siam, Persia, and further Abyssinia, although the latter is a Christian State. Their civilisation is essentially so different from that of the Christian States that international intercourse with them of the same kind as between Christian States has been hitherto impossible. And neither their governments nor their population are at present able to fully understand the Law of Nations and to take up an attitude which is in conformity with all the rules of this law. There should be no doubt that these States are not International Persons of the same kind and the same position within the Family of Nations as Christian States. But it is equally wrong to maintain that they are absolutely outside the Family of Nations, and are for no part International Persons. Since they send and receive diplomatic envoys and conclude international treaties, the opinion is justified that such States are International Persons only in some respects—namely, those in which they have expressly or tacitly been received into the Family of Nations. When Christian States begin such inter-

course with these non-Christian States as to send diplomatic envoys to them and receive their diplomatic envoys, and when they enter into treaty obligations with them, they indirectly declare that they are ready to recognise them for these parts as International Persons and subjects of the Law of Nations. But for other parts such non-Christian States remain as yet outside the circle of the Family of Nations, especially with regard to war, and they are for those parts treated by the Christian Powers according to discretion. This condition of things will, however, not last very long. It may be expected that with the progress of civilisation these States will become sooner or later International Persons in the full sense of the term.

X

The Holy See

Hall, § 98—Westlake, I. pp. 37-39—Lawrence, § 143—Phillimore, I. §§ 278-440—Twiss, I. §§ 206-207—Taylor, §§ 277, 278, 282—Wharton, I. § 70, p. 546—Bluntschli, § 172—Heffter, §§ 40-41—Geffcken in Holtzendorff, II. pp. 151-222—Gareis, § 13—Liszt, § 5—Ullmann, § 19—Bonfils, Nos. 370-396—Despagnet, Nos. 147-164—Rivier, I. § 8—Fiore, I. Nos. 520, 521—Martens, I. § 84—Fiore, "Della condizione giuridica internazionale della chiesa e del Papa" (1887)—Bombard, "Le Pape et le droit des gens" (1888)—Imbart-Latour, "La papauté en droit international" (1893).

The former Papal States.

§ 104. When the Law of Nations began to grow up among the States of Christendom, the Pope was the monarch of one of those States—namely, the so-called Papal States. This State owed its existence to Pepin-le-Bref and his son Charlemagne, who established it in gratitude to the Popes Stephen III. and Adrian I., who crowned them as Kings of the Franks. It remained

in the hands of the Popes till 1798, when it became a republic for about three years. In 1801 the former order of things was re-established, but in 1809 it became a part of the Napoleonic Empire. In 1814 it was re-established and remained in existence till 1870, when it was annexed to the Kingdom of Italy. Throughout the existence of the Papal States, the Popes were monarchs and, as such, equals to all other monarchs. Their position was, however, even then anomalous, as their influence and the privileges granted to them by the different States were due, not alone to their being monarchs of a State, but to their being the head of the Roman Catholic Church. But this anomaly did not create any real difficulty, since the privileges granted to the Popes existed within the province of precedence only.

The Italian Law of Guaranty.

§ 105. When, in 1870, Italy annexed the Papal States and made Rome her capital, she had to undertake the task of creating a position for the Holy See and the Pope which was consonant with the importance of the latter to the Roman Catholic Church. It seemed impossible that the Pope should become an Italian subject and that the Holy See should be an institution under the territorial supremacy of Italy. For many reasons no alteration was desirable in the administration by the Holy See of the affairs of the Roman Catholic Church or in the position of the Pope as the inviolable head of that Church. For that purpose the Italian Parliament passed an Act regarding the guaranties granted to the Pope and the Holy See, which is commonly called the "Law of Guaranty." According to this the position of the Pope and the Holy See is in Italy as follows:—

The person of the Pope is sacred and inviolable (article 1). An offence against his person is to be

punished in the same way as an offence against the King of Italy (article 2). He enjoys all the honours of a sovereign, retains the privileges of precedence conceded to him by Roman Catholic monarchs, has the right to keep an armed body-guard of the same strength as before the annexation for the safety of his person and of his palaces (article 3), and receives an allowance of 3,225,000 francs (article 4). The Vatican, the seat of the Holy See, and the palaces where a conclave for the election of a new Pope or where an Oecumenical Council meets, are inviolable, and no Italian official is allowed to enter them without consent of the Holy See (articles 5–8). The Pope is absolutely free in performing all the functions connected with his mission as head of the Roman Catholic Church, and so are his officials (articles 9 and 10). The Pope has the right to send and to receive envoys, who enjoy all the privileges of the diplomatic envoys sent and received by Italy (article 11). The freedom of communication between the Pope and the entire Roman Catholic world is recognised, and the Pope has therefore the right to a post and telegraph office of his own in the Vatican or any other place of residence and to appoint his own post-office clerks (article 12). And, lastly, the colleges and other institutions of the Pope for the education of priests in Rome and the environments remain under his exclusive supervision, without any interference on the part of the Italian authorities.

No Pope has as yet recognised this Italian Law of Guaranty, nor had foreign States an opportunity of giving their express consent to the position of the Pope in Italy created by that law. But practically foreign States as well as the Popes themselves, although the latter have never ceased to protest against the

condition of things created by the annexation of the Papal States, have made use of the provisions[1] of that law. Several foreign States send side by side with their diplomatic envoys accredited to Italy special envoys to the Pope, and the latter sends envoys to several foreign States.

International position of the Holy See and the Pope.

§ 106. The Law of Guaranty is not International but Italian Municipal Law, and the members of the Family of Nations have hitherto not made any special arrangements with regard to the International position of the Holy See and the Pope. And, further, there can be no doubt that since the extinction of the Papal States the Pope is no longer a monarch whose sovereignty is derived from his position as the head of a State. For these reasons many writers[2] maintain that the Holy See and the Pope have no longer any international position whatever according to the Law of Nations, since States only and exclusively are International Persons. But if the facts of international life and the actual condition of things in every-day practice are taken into consideration, this opinion has no basis to stand upon. Although the Holy See is not a State, the envoys sent by her to foreign States are treated by the latter on the same footing with diplomatic envoys as regards exterritoriality, inviolability, and ceremonial privileges, and those foreign States which send envoys to the Holy See claim for them from Italy all the privileges and the position of diplomatic envoys. Further, although the Pope is no longer the head of a State, the privileges due to the head of a monarchical State are still granted to him by foreign States. Of

[1] But the Popes have hitherto never accepted the allowance provided by the Law of Guaranty.

[2] Westlake, I. p. 38, now joins the ranks of these writers.

course, through this treatment the Holy See does not acquire the character of an International Person, nor does the Pope thereby acquire the character of a head of a monarchical State. But for some points the Holy See is actually treated as though she were an International Person, and the Pope is treated actually in every point as though he were the head of a monarchical State. It must therefore be maintained that by custom, by tacit consent of the members of the Family of Nations, the Holy See has a *quasi* international position. This position allows her to claim against all the States treatment on some points as though she were an International Person, and further to claim treatment of the Pope in every point as though he were the head of a monarchical State. But it must be emphasised that, although the envoys sent and received by the Holy See must be treated as diplomatic envoys, they are not such in fact, for they are not agents for international affairs of States, but exclusively agents for the affairs of the Roman Catholic Church. And it must further be emphasised that the Holy See cannot conclude international treaties or claim a vote at international congresses and conferences. The so-called Concordats—that is, treaties between the Holy See and States with regard to matters of the Roman Catholic Church—are not international treaties, although analogous treatment is usually given to them. Even formerly, when the Pope was the head of a State, such Concordats were not concluded with the Papal States, but with the Holy See and the Pope as representatives of the Roman Catholic Church.

Violation of the Holy See and the Pope.

§ 107. Since the Holy See has no power whatever to protect herself and the person of the Pope against violations, the question as to the protection of the

Holy See and the person of the Pope arises. I believe that, since the present international position of the Holy See rests on the tacit consent of the members of the Family of Nations, many a Roman Catholic Power would raise its voice in case Italy or any other State should violate the Holy See or the person of the Pope, and an intervention for the purpose of protecting either of them would have the character of an intervention by right. Italy herself would certainly make such a violation by a foreign Power her own affair, although she has no more than any other Power the legal duty to do so, and although she is not responsible to other Powers for violations of the Personality of the latter by the Holy See and the Pope.

XI

International Persons of the Present Day

European States

§ 108. All the seventy-two European States are, of course, members of the Family of Nations. They are the following:

Great Powers are:

Austria-Hungary.	Great Britain.
France.	Italy.
Germany.	Russia.

Smaller States are:

Denmark.	Roumania.
Greece.	Servia.
Holland.	Spain.
Montenegro.	Sweden-Norway.
Portugal.	Turkey.

Very small, but nevertheless full-Sovereign, States are:

Monaco and Lichtenstein.

Neutralised States are:

Switzerland, Belgium, and Luxemburg.

Half-Sovereign States are:

Andorra (under the protectorate of France and Spain).

San Marino (under the protectorate of Italy).

Bulgaria, Crete } (under the suzerainty of Turkey).

Part-Sovereign States are:

(*a*) Member-States of Germany:

Kingdoms: Prussia, Bavaria, Saxony, Würtemberg.

Grand-Duchies: Baden, Hesse, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg.

Dukedoms: Anhalt, Brunswick, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar.

Principalities: Reuss Elder Line, Reuss Younger Line, Lippe, Schaumburg-Lippe, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck.

Free Towns are: Bremen, Lübeck, Hamburg.

(*b*) Member-States of Switzerland:

Zurich, Berne, Lucerne, Uri, Schwyz, Unterwalden (ob und nid dem Wald), Glarus, Zug, Fribourg, Soleure, Basle (Stadt und Landschaft), Schaffhausen, Appenzell (beider Rhoden), St. Gall, Grisons, Aargau, Thurgau, Tessin, Vaud, Valais, Neuchatel, Geneva.

American states.

§ 109. In America there are twenty-one States which are members of the Family of Nations, but it must be emphasised that the member-States of the five Federal States on the American continent, although they are part-Sovereign, have no footing within the Family of Nations, because the American Federal States, in contradistinction to Switzerland and Germany, absorb all possible international relations of their member-States. But there is a union of Confederated States—namely, the Major Republic of Central America, consisting of Honduras, Nicaragua, and San Salvador, which are all full-Sovereign States.

In North America there are :

The United States of America.
The United States of Mexico.

In Central America there are :

Honduras.
Nicaragua.
San Salvador.
} (The Major Republic of Central America.)

Guatemala.
Panama (since 1903).
San Domingo.
Costa Rica.
Hayti.
Cuba.

In South America there are :

Colombia.
Ecuador.
Peru.
The United States of Venezuela.
The United States of Brazil.
Uruguay.
Bolivia.
Paraguay.
The United States of Argentina.
Chili.

African States.

§ 110. In Africa the Negro Republic of Liberia and the Congo Free State are the only real and full members of the Family of Nations. Egypt and

Tunis are half-Sovereign, the one under Turkish suzerainty, the other under French protectorate. Morocco and Abyssinia are both full-Sovereign States, but for some parts only within the Family of Nations. The Soudan has an exceptional position; being under the *condominium* of Great Britain and Egypt, a footing of its own within the Family of Nations the Soudan certainly has not.

Asiatic States.

§ 111. In Asia only Japan is a full and real member of the Family of Nations. Persia, China, Korea, Siam, and Tibet are for some parts only within that family.

CHAPTER II

POSITION OF THE STATES WITHIN THE FAMILY OF NATIONS

I

International Personality

Vattel, I. §§ 13–25—Hall, § 7—Westlake, I. pp. 293–296—Lawrence, § 69—Phillimore, I. §§ 144–147—Twiss, I. § 106—Wharton, § 60—Bluntschli, §§ 64–81—Hartmann, § 15—Heffter, § 26—Holtzendorff in Holtzendorff, II. pp. 47–51—Gareis, §§ 24–25—Liszt, § 7—Ullmann, § 29—Bonfils, Nos. 235–241—Despagnet, Nos. 165–166—Pradier-Fodéré, I. Nos. 165–195—Rivier, I. § 19—Fiore, I. Nos. 367–371—Martens, I. § 72—Fontenay, "Des droits et des devoirs des Etats entre eux" (1888)—Pillet in R.G.V. (1898), pp. 66 and 236, VI. (1899), p. 503.

The so-called Fundamental Rights.

§ 112. Until the last two decades of the nineteenth century all jurists agreed that the membership of the Family of Nations includes so-called fundamental rights for States. Such rights are chiefly enumerated as the right of existence, of self-preservation, of equality, of independence, of territorial supremacy, of holding and acquiring territory, of intercourse, and of good name and reputation. It was and is maintained that these fundamental rights are a matter of course and self-evident, since the Family of Nations consists of Sovereign States. But no unanimity exists with regard to the number, the names, and the contents of these alleged fundamental rights. A great confusion exists in this matter, and hardly two text-book writers agree in details with regard to it. This condition of things

has led to a searching criticism of the whole matter, and several writers[1] have in consequence thereof asked that the fundamental rights of States should totally disappear from the treatises on the Law of Nations. I certainly agree with this. Yet it must be taken into consideration that under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years, and that numerous real rights and duties are customarily recognised which are derived from the very membership of the Family of Nations. They are rights and duties which do not rise from international treaties between a multitude of States, but which the States customarily hold as International Persons, and which they grant and receive reciprocally as members of the Family of Nations. They are rights and duties connected with the position of the States within the Family of Nations, and it is therefore only adequate to their importance to discuss them in a special chapter under that heading.

International Personality a Body of Qualities.

§ 113. International Personality is the term which characterises fitly the position of the States within the Family of Nations, since a State acquires International Personality through its recognition as a member. What it really means can be ascertained by going back to the basis[2] of the Law of Nations. Such basis is the common consent of the States that a body of legal rules shall regulate their intercourse with one another. Now a legally regulated intercourse

[1] See Stoerk in Holtzendorff's Encylopädie der Rechtswissenschaft, 2nd ed. (1890), p. 1291; Jellinek, System der subjectiven öffentlichen Rechte (1892), p. 302; Heilborn, System, p. 279; and others. The arguments of these writers have met, however, considerable resistance, and the existence of fundamental rights of States is emphatically defended by other writers. See Liszt, § 7, and Gareis, §§ 24 and 25. Westlake, I. p. 293, now joins the ranks of those writers who deny the existence of fundamental rights.

[2] See above, § 12.

between Sovereign States is only possible under the condition that a certain liberty of action is granted to every State, and that, on the other hand, every State consents to a certain restriction of action in the interest of the liberty of action granted to every other State. A State that enters into the Family of Nations retains the natural liberty of action due to it in consequence of its sovereignty, but at the same time takes over the obligation to exercise self-restraint and to restrict its liberty of action in the interest of that of other States. In entering into the Family of Nations a State comes as an equal to equals;[1] it demands a certain consideration to be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy. Recognition of a State as a member of the Family of Nations contains recognition of such State's equality, dignity, independence, and territorial and personal supremacy. But the recognised State recognises in turn the same qualities in other members of that family, and thereby it undertakes responsibility for violations committed by it. All these qualities constitute as a body the International Personality of a State, and International Personality may therefore be said to be the fact, given by the very membership of the Family of Nations, that equality, dignity, independence, territorial and personal supremacy, and the responsibility of every State are recognised by every other State. The States are International Persons because they recognise these qualities in one another and recognise their responsibility for violations of these qualities.

Other Characteristics of

§ 114. But the position of the States within the Family of Nations is not exclusively characterised

[1] See above, § 14.

by these qualities. The States make a community because there is constant intercourse between them. Intercourse is therefore a condition without which the Family of Nations would not and could not exist. Again, there are exceptions to the protection of the qualities which constitute the International Personality of the States, and these exceptions are likewise characteristic of the position of the States within the Family of Nations. Thus, in time of war belligerents have a right to violate one another's Personality in many ways; even annihilation of the vanquished State, through subjugation after conquest, is allowed. Thus, further, in time of peace as well as in time of war, such violations of the Personality of other States are excused as are committed in self-preservation or through justified intervention. And, finally, jurisdiction is also important for the position of the States within the Family of Nations. Intercourse, self-preservation, intervention, and jurisdiction must, therefore, likewise be discussed in this chapter.

the position of the States within the Family of Nations.

II

Equality, Rank, and Titles

Vattel, II. §§ 35–48—Westlake, I. pp. 308–312—Lawrence, §§ 134–140—Phillimore, I. § 147, II. §§ 27–43—Twiss, I. § 12—Halleck, I. pp. 116–140—Taylor, § 160—Wheaton, §§ 152–159—Bluntschli, §§ 81–94—Hartmann, § 14—Heffter, §§ 27–28—Holtzendorff in Holtzendorff, II. pp. 11–14—Ullmann, §§ 27, 28—Bonfils, Nos. 272–278—Despagnet, Nos. 167–171—Pradier-Fodéré, II. Nos. 484–594—Rivier, I. § 9—Calvo, I. §§ 210–259—Fiore, I. Nos. 428–451—Martens, I. §§ 70, 71—Westlake, Chapters, pp. 86–109.

§ 115. The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their International Personality.[1] Whatever inequality may exist between

Legal Equality of States.

[1] See above, §§ 14 and 113.

States as regards their size, population, power, degree of civilisation, wealth, and other qualities, they are nevertheless equals as International Persons. The consequence of this legal equality is that, whenever a question arises which has to be settled by the consent of the members of the Family of Nations, every State has a right to a vote, but to one vote only. And legally the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful. Therefore any alteration of an existing rule or creation of a new rule of International Law by a law-making treaty has legal validity for the signatory Powers and those only who later on accede expressly or submit to it tacitly through custom.

To the rule of equality there are three exceptions. First, such half-civilised and similar States as can for some parts [1] only be considered International Persons, are not equals of the full members of the Family of Nations. Secondly, States under suzerainty and under protectorate which are half-Sovereign and under the guardianship [2] of other States with regard to the management of external affairs, are not equals of States which enjoy full sovereignty. And, thirdly, member-States of a Federal State which, because they have transferred parts of their internal and external sovereignty to their Federal State, are part-Sovereign, are likewise not equals of full-Sovereign States. But a general rule concerning the amount of inequality between the equal and the unequal States cannot be laid down, as everything depends upon the special case.

§ 116. Legal equality must not be confounded with political equality. The enormous differences between States as regards their strength are the

[1] See above, § 103. [2] See above, §§ 91 and 93.

result of a natural inequality which, apart from rank and titles, finds its expression in the province of policy. Politically, States are in no manner equals, as there is a difference between the Great Powers and others. Eight States must at present be considered as Great Powers—namely, Great Britain, Austria-Hungary, France, Germany, Italy, and Russia in Europe, the United States in America, and Japan in Asia. All arrangements made by the body of the Great Powers naturally gain the consent of the minor States, and the body of the six Great Powers in Europe is therefore called the European Concert. The Great Powers are the leaders of the Family of Nations, and every progress of the Law of Nations during the past is the result of their hegemony, although the initiative towards the progress was frequently taken by a minor Power.

Political Hegemony of Great Powers.

But, however important the position and the influence of the Great Powers may be, they are by no means derived from a legal basis or rule.[1] It is nothing else than powerful example which makes the smaller States agree to arrangements of the Great Powers. Nor has a State the character of a Great Power by law. It is nothing else than its actual size and strength which makes a State a Great Power. Changes, therefore, often take place. Whereas at the time of the Vienna Congress in 1815 eight States —namely, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia—were still considered Great Powers, their number decreased soon to five, when Portugal, Spain, and Sweden lost that character. But the so-called Pentarchy of the remaining Great Powers turned into a Hexarchy after

[1] This is, however, maintained by a few writers. See Lorimer, I. p. 170; Lawrence, p. 241; and Westlake, I. pp. 308, 309.

the unification of Italy, because the latter became at once a Great Power. The United States rose as a Great Power out of the civil war in 1865, and Japan did the same out of the war with China in 1895. Any day a change may take place and one of the present Great Powers may lose its position, or one of the weaker States may become a Great Power. It is a question of political influence, and not of law, whether a State is or is not a Great Power. Whatever large-sized State establishes an army and navy of such strength that its political influence must be reckoned with by the other Great Powers, becomes a Great Power itself.[1]

Rank of States.

§ 117. Although the States are equals as International Persons, they are nevertheless not equals as regards rank. The differences as regards rank are recognised by International Law, but the legal equality of States within the Family of Nations is thereby as little affected as the legal equality of the citizens is within a modern State where differences in rank and titles of the citizens are recognised by Municipal Law. The vote of a State of lower rank has legally as much weight as that of a State of higher rank. And the difference in rank nowadays no longer plays such an important part as in the past, when questions of etiquette gave occasion for much dispute. It was in the sixteenth and seventeenth century that the rank of the different States was zealously discussed under the heading of *droit de préséance* or *questions de préséance*. The Congress

[1] In contradistinction to the generally recognised political hegemony of the Great Powers, Lawrence (§§ 134-136) and Taylor (§ 69) maintain that the position of the Great Powers is *legally* superior to that of the smaller States, being a "Primacy" or "Overlordship." This doctrine, which professedly seeks to abolish the universally recognised rule of the equality of States, has no sound basis, and confounds political with legal inequality.

at Vienna of 1815 intended to establish an order of precedence within the Family of Nations, but dropped this scheme on account of practical difficulties. Thus the matter is entirely based on custom, which recognises the following three rules:

(1) The States are divided into two classes—namely, States with and States without royal honours. To the first class belong Empires, Kingdoms, Grand Duchies, and the great Republics such as France, the United States of America, Switzerland, the South American Republics, and others. All other States belong to the second class. The Holy See is treated as though it were a State with royal honours. States with royal honours have exclusively the right to send and receive diplomatic envoys of the first class[1] —namely, ambassadors; and their monarchs address one another as "brothers" in their official letters. States with royal honours always precede other States.

(2) Full-Sovereign States always precede those under suzerainty or protectorate.

(3) Among themselves States of the same rank do not precede one another. Empires do not precede kingdoms, and since the time of Cromwell and the first French Republic monarchies do not precede republics. But the Roman Catholic States always concede precedence to the Holy See, and the monarchs recognise among themselves a difference with regard to ceremonials between emperors and kings on the one hand, and, on the other, grand dukes and other monarchs.

The "Alternat."

§ 118. To avoid questions of precedence, on signing a treaty, States of the same rank observe a conventional usage which is called the "Alternat." According to that usage the signatures of the signa-

[1] See below, § 365.

tory States of a treaty alternate in a regular order or in one determined by lot, the representative of each State signing first the copy which belongs to his State. But sometimes that order is not observed, and the States sign either in the alphabetical order of their names in French or in no order at all (*pêle-mêle*).

Titles of States.

§ 119. At the present time, States, save in a few exceptional instances, have no titles, although formerly such titles did exist. Thus the former Republic of Venice as well as that of Genoa was addressed as "Serene Republic," and up to the present day the Republic of San Marino[1] is addressed "Most Serene Republic." Nowadays the titles of the heads of monarchical States are in so far of importance to International Law as they are connected with the rank of the respective States. Since States are Sovereign, they can bestow any titles they like on their heads. Thus, according to the German Constitution of 1871, the Kings of Prussia have the title "German Emperor;" the Kings of England have since 1877 borne the title "Emperor of India;" the King of the Belgians assumed in 1885 the title "Sovereign of the Independent Congo State;" the Prince of Servia assumed in 1881, and that of Roumania in 1882, the title "King." But no foreign State is obliged to recognise such a new title, especially when a higher rank would accrue to the respective State in consequence of such a new title of its head. In practice such recognition will regularly be given when the new title really corresponds with the size and the importance of the respective State.[2] Servia

[1] See Treaty Series, 1900, No. 9.

[2] History, however, reports several cases where recognition was withheld for a long time. Thus the title "Emperor of Russia," assumed by Peter the Great in 1701, was not recognised by France till 1745, by Spain till 1759, nor by Poland till 1764. And the Pope did not recognise the kingly title of Prussia, assumed in 1701, till 1786.

and Roumania had therefore no difficulty in obtaining recognition as kingdoms.

With the titles of the heads of States are connected predicates. Emperors and Kings have the predicate "Majesty," Grand Dukes "Royal Highness," Dukes "Highness," other monarchs "Serene Highness." The Pope is addressed as "Holiness" (*Sanctitas*). Not to be confounded with these predicates, which are recognised by the Law of Nations, are predicates which originally were bestowed on monarchs by the Pope and which have no importance for the Law of Nations. Thus the Kings of France called themselves *Rex Christianissimus* or "First-born Son of the Church," the Kings of Spain have called themselves since 1496 *Rex Catholicus*, the Kings of England since 1513 *Defensor Fidei*, the Kings of Portugal since 1748 *Rex Fidelissimus*, the Kings of Hungary since 1758 *Rex Apostolicus*.

III

Dignity

Vattel, II. §§ 35-48—Lawrence, § 140—Phillimore, II. §§ 27-43—Halleck, I. pp. 124-142—Taylor, § 162—Wheaton, § 160—Bluntschli, §§ 82-83—Hartmann, § 15—Heffter, §§ 32, 102, 103—Holtzendorff in Holtzendorff, II. pp. 64-69—Ullmann, § 29—Bonfils, Nos. 279-284—Despagnet, Nos. 184-186—Pradier-Fodéré, II. Nos. 451-483—Rivier, I. pp. 260-262—Calvo, III. §§ 1300-1302—Fiore, I. Nos. 439-451—Martens, I. § 78.

Dignity a Quality.

§ 120. The majority of text-book writers maintain that there is a fundamental right of reputation and of good name on the part of every State. Such a right, however, does not exist, because no duty corresponding to it can be traced within the Law of Nations. Indeed, the reputation of a State depends

just as much upon behaviour as that of every citizen within its boundaries. A State which has a corrupt government and behaves unfairly and perfidiously in its intercourse with other States will be looked down upon and despised, whereas a State which has an uncorrupt government and behaves fairly and justly in its international dealings will be highly esteemed. No law can give a good name and reputation to a rogue, and the Law of Nations does not and cannot give a right to reputation and good name to such a State as has not acquired them through its attitude. There are some States—*nomina sunt odiosa!*—which indeed justly enjoy a bad reputation.

On the other hand, a State as a member of the Family of Nations possesses dignity as an International Person. Dignity is a quality recognised by other States, and it adheres to a State from the moment of its recognition till the moment of its extinction, whatever behaviour it displays. Just as the dignity of every citizen within a State commands a certain amount of consideration on the part of fellow-citizens, so the dignity of a State commands a certain amount of consideration on the part of other States, since otherwise the different States could not live peaceably in the community which is called the Family of Nations.

Consequences of the Dignity of States.

§ 121. Since dignity is a recognised quality of States as International Persons, all members of the Family of Nations grant reciprocally to one another by custom certain rights and ceremonial privileges. These are chiefly the rights to demand—that their heads shall not be libelled and slandered; that their heads and likewise their diplomatic envoys shall be granted exterritoriality and inviolability when abroad, and at home and abroad in the official

intercourse with representatives of foreign States shall be granted certain titles; that their men-of-war shall be granted exterritoriality when in foreign waters; that their symbols of authority, such as flags and coats of arms, shall not be made improper use of and not be treated with disrespect on the part of other States. Every State must not only itself comply with the duties corresponding to these rights of other States, but must also prevent its subjects from such acts as violate the dignity of foreign States, and must punish them for acts of that kind which it could not prevent. The Municipal Laws of all the States must therefore provide punishment for those who commit offences against the dignity of foreign States,[1] and, if the Criminal Law of the land does not contain such provisions, it is no excuse for failure by the respective States to punish offenders. But it must be emphasised that a State must prevent and punish such acts only as really violate the dignity of a foreign State. Mere criticism of policy, historical verdicts concerning the attitude of States and their rulers, utterances of moral indignation condemning immoral acts of foreign Governments and their monarchs need neither be suppressed nor punished.

Maritime Ceremonials.

§ 122. Connected with the dignity of States are the maritime ceremonials between vessels and between vessels and forts which belong to different States. In former times discord and jealousy existed between the States regarding such ceremonials, since they were

[1] According to the Criminal Law of England, "every one is guilty of a misdemeanour who publishes any libel tending to degrade, revile, or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary, with the intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs." See Stephen, A Digest of the Criminal Law, article 91.

looked upon as means of keeping up the superiority of one State over another. Nowadays, so far as the Open Sea is concerned, they are considered as mere acts of courtesy recognising the dignity of States. They are the outcome of international usages, and not of International Law, in honour of the national flags. They are carried out by dipping flags or striking sails or firing guns.[1] But so far as the territorial maritime belt is concerned, riparian States can make laws concerning maritime ceremonials to be observed by foreign merchantmen.[2]

IV

Independence and Territorial and Personal Supremacy

Vattel, I. Préliminaires, §§ 15–17—Hall, § 10—Westlake, I. pp. 308–312—Lawrence, §§ 70–73—Phillimore, I. §§ 144–149—Twiss, I. § 20—Halleck, I. pp. 93–113—Taylor, § 160—Wheaton, §§ 72–75—Bluntschli, §§ 64–69—Hartmann, § 15—Heffter, §§ 29 and 31—Holtzendorff in Holtzendorff, II. pp. 36–60—Gareis, §§ 25–26—Ullmann, § 29—Bonfils, Nos. 253–271—Despagnet, Nos. 187–189—Pradier-Fodéré, I. Nos. 287–332—Rivier, I. § 21—Calvo, I. §§ 107–109—Fiore, I. Nos. 372–427—Martens, I. §§ 74, 75—Westlake, Chapters, pp. 86–106.

Independence and Territorial as well as Personal Supremacy as Aspects of Sovereignty.

§ 123. Sovereignty as supreme authority, which is independent of any other earthly authority, may be said to have different aspects. As excluding dependence from any other authority, and in especial from the authority of another State, sovereignty is *independence*. It is *external* independence with regard to the liberty of action outside its borders in the intercourse with other States which a State enjoys. It is *internal* independence with regard to the liberty of action of

[1] See Halleck, I. pp. 124–142, where the matter is treated with all details. See also below, § 257.

[2] See below, § 187.

a State inside its borders. As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is *territorial* supremacy. As comprising the power of a State to exercise supreme authority over its citizens at home and abroad, sovereignty is *personal* supremacy.

For these reasons a State as an International Person possesses independence and territorial and personal supremacy. These three qualities are nothing else than three aspects of the very same sovereignty of a State, and there is no sharp boundary line between them. The distinction is apparent and useful, although internal independence is nothing else than sovereignty comprising territorial supremacy, but viewed from a different point of view.

Consequences of Independence and Territorial and Personal Supremacy.

§ 124. Independence and territorial as well as personal supremacy are not rights, but recognised and therefore protected qualities of States as International Persons. The protection granted to these qualities by the Law of Nations finds its expression in the right of every State to demand that other States abstain themselves, and prevent their organs and subjects, from committing any act which contains a violation of its independence and its territorial as well as personal supremacy.

In consequence of its external independence, a State can manage its international affairs according to discretion, especially enter into alliances and conclude other treaties, send and receive diplomatic envoys, acquire and cede territory, make war and peace.

In consequence of its internal independence and territorial supremacy, a State can adopt any Constitution it likes, arrange its administration in a way it thinks fit, make use of legislature as it pleases

organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on. According to the rule, *quidquid est in territorio est etiam de territorio*, all individuals and all property within the territory of a State are under the latter's dominion and sway, and even foreign individuals and property fall at once under the territorial supremacy of a State when they cross its frontier. Foreigners residing in a State can therefore be compelled to pay rates and taxes, and to serve in the police under the same conditions as citizens for the purpose of maintaining order and safety. But foreigners may be expelled, or not received at all. On the other hand, hospitality may be granted to them whatever act they have committed abroad, provided they abstain from making the hospitable territory the basis for attempts against a foreign State. And a State can through naturalisation adopt foreign subjects residing on its territory without the consent of the home State, provided the individuals themselves give their consent.

In consequence of its personal supremacy, a State can treat its subjects according to discretion, and it retains its power even over such subjects as emigrate without thereby losing their citizenship. A State may therefore command its citizens abroad to come home and fulfil their military service, may require them to pay rates and taxes for the support of the home finances, may ask them to comply with certain conditions in case they desire marriages concluded abroad or wills made abroad recognised by the home authorities, can punish them on their return for crimes they have committed abroad.

§ 125. The duty of every State to abstain itself and to prevent its organs and subjects from any act

which contains a violation[1] of another State's independence or territorial and personal supremacy is correlative to the respective right of the other State. It is impossible to enumerate all such actions as might contain a violation of this duty. But it is of value to give some illustrative examples. Thus, in the interest of the independence of other States, a State is not allowed to interfere in the management of their international affairs nor to prevent them from doing or to compel them to do certain acts in their international intercourse. Further, in the interest of the territorial supremacy of other States, a State is not allowed to send its troops, its men-of-war, and its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission.[2] Again, in the interest of the personal supremacy of other States, a State is not allowed to naturalise foreigners residing on its territory without their consent,[3] nor to prevent them from returning home for the purpose of fulfilling military service or from paying rates and taxes to their home State, nor to incite citizens of foreign States to emigration.

Violations of Independence and Territorial and Personal Supremacy.

§ 126. Independence is not boundless liberty of a State to do what it likes without any restriction whatever. The mere fact that a State is a member of the Family of Nations restricts its liberty of action with regard to other States because it is bound not to intervene in the affairs of other States. And

Restrictions upon Independence.

[1] See below, § 155.

[2] But neighbouring States very often give such permission to one another. Switzerland, for instance, allows German Custom House officers to be stationed on two railway stations of Basle for the purpose of examining the luggage of travellers from Basle to Germany.

[3] See, however, below (§ 299), where the fact is stated that some States naturalise a foreigner through the very fact of his taking domicile on their territory.

it is generally admitted that a State can through conventions, such as a treaty of alliance or neutrality and the like, enter into many obligations which hamper it more or less in the management of its international affairs. Independence is a question of degree, and it is therefore also a question of degree whether the independence of a State is destroyed or not by certain restrictions. Thus it is generally admitted that States under suzerainty and under protectorate are so much restricted that they are not fully independent, but half-Sovereign. And the same is the case with the member-States of a Federal State which are part-Sovereign. On the other hand, the restrictions connected with the neutralisation of States does, according to the correct opinion,[1] not destroy their independence, although they cannot make war except in self-defence, cannot conclude alliances, and are in other ways hampered in their liberty of action.

From a political and a legal point of view it is of great importance that the States imposing and those accepting restrictions upon independence should be clear in their intentions. For the question may arise whether these restrictions make the respective State a dependent one. For instance, through article 4 of the Convention of London of 1884 between Great Britain and the former South African Republic stipulating that the latter should not conclude any treaty with any foreign State, the Orange Free State excepted, without approval on the part of Great Britain, the Republic was so much restricted that Great Britain considered herself justified in defending the opinion that the Republic was not an independent State,

[1] See above, § 97.

although the Republic itself and many writers were of a different opinion.[1]

Restrictions upon Territorial Supremacy.

§ 127. Just like independence, territorial supremacy does not give a boundless liberty of action. Thus, by customary International Law every State has a right to demand that its merchantmen can pass through the maritime belt of other States. Thus, further, navigation on so-called international rivers in Europe must be open to merchantmen of all States. Thus, thirdly, foreign monarchs and envoys, foreign men-of-war, and foreign armed forces must be granted exterritoriality. Thus, fourthly, through the right of protection over citizens abroad which is held according to customary International Law by every State, a State cannot treat foreign citizens passing or residing on its territory arbitrarily according to discretion as it might treat its own subjects; it cannot, for instance, compel them to serve in its army or navy. Thus, to give another and fifth example, a State is, in spite of its territorial supremacy, not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance, to stop or to divert the flow of a river which runs from its own into neighbouring territory.

In contradistinction to these restrictions by the customary Law of Nations, a State can through treaties enter into obligations of many a kind without thereby losing its internal independence and territorial supremacy. Thus France by three consecutive treaties of peace—namely, that of Utrecht of

[1] It is of interest to state the fact that, before the last phase of the conflict between Great Britain and the Republic, influential Continental writers stated the suzerainty of Great Britain over the Republic. See Rivier, I. p. 89, and Holtzendorff in Holtzendorff, II. p. 115.

1713, that of Aix-la-Chapelle of 1748, and that of Paris of 1763—entered into the obligation to pull down and not to rebuild the fortifications of Dunkirk.[1] Napoleon I. imposed by the Peace Treaty of Tilsit of 1807 upon Prussia the restriction not to keep more than 42,000 men under arms. Again, article 29 of the Treaty of Berlin of 1878 imposes upon Montenegro the restriction not to possess a navy. There is hardly a State in existence which is not in one point or another restricted in its territorial supremacy by treaties with foreign Powers.

Restrictions upon Personal Supremacy.

§ 128. Personal Supremacy does not give a boundless liberty of action either. Although the citizens of a State remain under its power when abroad, such State is restricted in the exercise of this power with regard to all those matters in which the foreign State on whose territory these citizens reside is competent in consequence of its territorial supremacy. The duty to respect the territorial supremacy of a foreign State must prevent a State from doing all acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. Thus, for instance, a State is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land they reside in.

But a State may also by treaty obligation be for some parts restricted in the liberty of action with regard to its citizens. Thus articles 5, 25, 35, and 44 of the Treaty of Berlin of 1878 restrict the personal supremacy of Bulgaria, Montenegro, Servia,

[1] This restriction was abolished by article 17 of the Treaty of Paris of 1783.

and Roumania in so far as these States are thereby obliged not to impose any religious disabilities on any of their subjects.[1]

V

Self-preservation

Vattel, II. §§ 49–53—Hall, §§ 8, 83–86—Westlake, I. pp. 296–304—Phillimore, I. §§ 210–220—Twiss, I. §§ 106–112—Halleck, I. pp. 93–113—Taylor, §§ 401–409—Wheaton, §§ 61–62—Hartmann, § 15—Heffter, § 30—Holtzendorff in Holtzendorff, II. pp. 51–56—Gareis, § 25—Liszt, § 7—Ullmann, § 29—Bonfils, Nos. 242–252—Despagnet, Nos. 172–175—Pradier-Fodéré, I. Nos. 211–286—Rivier, I. § 20—Calvo, I. §§ 208–209—Fiore, I. Nos. 452–466—Martens, I. § 73—Westlake, Chapters, pp. 110–125.

Self-preservation an excuse for violations.

§ 129. From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States. Although regularly all the States have reciprocally to respect one another's Personality and are therefore bound not to violate one another, certain violations of another State committed by a State for the purpose of self-preservation are, as an exception, not prohibited by the Law of Nations. Thus, self-preservation is a factor of great importance for the position of the States within the Family of Nations, and most writers maintain that every State has a fundamental right of self-preservation.[2] But nothing of the kind is actually the case, if the real facts of the law are taken into consideration. If every State really had a *right* of self-preservation, all the

[1] See above, § 73.

[2] This right was formerly frequently called *droit de convenance* and was said to exist in the right of every State to act in favour of its interests in case of a conflict between its own and the interests of another State. (See Heffter, § 26.)

States would have the duty to admit, suffer, and endure every violation done to one another in self-preservation. But such duty does not exist. On the contrary, although self-preservation is in certain cases an excuse recognised by International Law, no State is obliged patiently to submit to violations done to it by such other State as acts in self-preservation, but can repulse them. It is a fact that in certain cases violations committed in self-preservation are not prohibited by the Law of Nations. But they remain nevertheless violations and can therefore be repulsed. Self-preservation is consequently an excuse, because violations of other States are in certain exceptional cases not prohibited when they are committed for the purpose and in the interest of self-preservation, although they need not patiently be suffered and endured by the States concerned.

What acts of self-preservation are excused.

§ 130. It is frequently maintained that every violation is excused as long as it was caused by the motive of self-preservation, but it becomes more and more recognised that violations of other States in the interest of self-preservation are excused in cases of *necessity* only. Such acts of violence in the interest of self-preservation are exclusively excused as are necessary in self-defence, because otherwise the acting State would have to suffer or have to continue to suffer a violation against itself. If an imminent violation or the continuation of an already commenced violation can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified. When, to give an example, a State is informed that on neighbouring territory a body of armed men is being organised for the purpose of a raid into its

own territory, and when the danger can be removed through an appeal to the authorities of the neighbouring country, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises and the threatened State is justified in invading the neighbouring country and disarming the intending raiders.

The reason of the thing makes it, of course, necessary for every State to judge for itself when it considers a case of necessity has arisen, and it is therefore impossible to lay down a hard and fast rule regarding the question when and when not a State can take recourse to self-help which violates another State. Everything depends upon the circumstances and conditions of the special case, and it is therefore of value to give some historical examples.

Case of the Danish Fleet (1807)

§ 131. After the Peace of Tilsit of 1807 the British Government[1] was cognisant of the provision of some secret articles of this treaty that France should be at liberty to seize the Danish fleet and to make use of it against Great Britain. This plan, when carried out, would have endangered the position of Great Britain, which was then waging war against France. As Denmark was not capable of defending herself against an attack of the French army in North Germany under Bernadotte and Davoust, who had orders to invade Denmark, the British Government requested Denmark to deliver up her fleet to the custody of Great Britain, and promised to restore it after the war. And at the same time the means of defence against French invasion and a guaranty of her whole possessions were offered to Denmark by England. The latter, however,

[1] I follow Hall's (§ 86) summary of the facts.

refused to comply with the British demands, whereupon the British considered a case of necessity in self-preservation had arisen, shelled Copenhagen, and seized the Danish fleet.

Case of Amelia Island.

§ 132. "Amelia Island, at the mouth of St. Mary's River, and at that time in Spanish territory, was seized in 1817 by a band of buccaneers, under the direction of an adventurer named McGregor, who in the name of the insurgent colonies of Buenos Ayres and Venezuela preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe called his Cabinet together in October 1817, and directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels."[1]

Case of the "Caroline."

§ 133. In 1837, during the Canadian rebellion, several hundreds of insurgents got hold of an island in the river Niagara, on the territory of the United States, and with the help of American subjects equipped a boat called the "Caroline" with the purpose of crossing into Canadian territory and bringing material help to the insurgents. The Canadian Government, timely informed of the imminent danger, sent a British force over into the American territory, which obtained possession of the "Caroline," seized her arms, and then sent her adrift down the falls of the Niagara. The United States complained of this British violation of her territorial supremacy, but Great Britain was in a position to prove that her act was necessary in self-preservation, since there was

[1] See Wharton, § 50 a.

not sufficient time to prevent the imminent invasion of her territory through application to the United States Government.[1]

VI

Intervention

Vattel, II. §§ 54-62—Hall, §§ 88-95—Westlake, I. pp. 304-308—Lawrence, § 74-89—Phillimore, I. §§ 390-415a—Halleck, I. pp. 94-109—Taylor, §§ 410-430—Walker, § 7—Wharton, I. §§ 45-72—Wheaton, §§ 63-71—Bluntschli, §§ 474-480—Hartmann, § 17—Heffter, §§ 44-46—Geffcken in Holtzendorff, II. pp. 131-168—Gareis, § 26—Liszt, § 7—Ullmann, §§ 139-140—Bonfils, Nos. 295-323—Despagnet, Nos. 193-216—Pradier-Fodéré, I. Nos. 354-441—Rivier, I. § 31—Calvo, I. §§ 110-206—Fiore, I. Nos. 561-608—Martens, I. § 76—Bernard, "On the Principle of non-Intervention" (1860)—Hautefeuille, "Le principe de non-intervention" (1863)—Stapleton, "Intervention and Non-intervention, or the Foreign Policy of Great Britain from 1790 to 1865" (1866)—Geffcken, "Das Recht der Intervention" (1887)—Kebedgy, "De l'intervention" (1890)—Floecker, "De l'intervention en droit international" (1896).

Conception and character of Intervention.

§ 134. Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Such intervention can take place by right or without a right, but it always concerns the external independence or the territorial or personal supremacy of the respective State, and the whole matter is there-

[1] See Wharton, I. § 50 c, and Hall, § 84. With the case of the "Caroline" is connected the case of Macleod, which will be discussed below, § 446. Hall (§ 86), Martens (I. § 73), and others quote also the case of the "Virginius" as an example of necessity of self-preservation, but it seems that the Spanish Government did not plead self-preservation but piracy as justification of the capture of the vessel. That a vessel sailing under another State's flag can nevertheless be seized on the high seas in case she is sailing to a port of the capturing State for the purpose of an invasion or bringing material help to insurgents, there is no doubt. No better case of necessity of self-preservation could be given, since the danger is imminent and can be frustrated only by capture of the vessel.

fore of great importance for the position of the States within the Family of Nations. That intervention is as a rule forbidden by the Law of Nations which protects the International Personality of the States, there is no doubt. On the other hand, there is just as little doubt[1] that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take place by right, are nevertheless admitted by the Law of Nations and are excused in spite of the violation of the Personality of the respective States they involve.

Intervention can take place in the external as well as in the internal affairs of a State. It concerns in the first case the external independence, and in the second either the territorial or the personal supremacy. But it must be emphasised that intervention proper is always *dictatorial* interference, not interference pure and simple.[2] Therefore intervention must neither be confounded with good offices, nor with mediation, nor with intercession, nor with co-operation, because none of these imply a *dictatorial* interference. Good offices is the name for such acts of friendly Powers interfering in a conflict between two other States as tend to call negotiations into existence for the peaceable settlement of the conflict, and mediation is the name for the direct conduct on the part of a friendly Power of such negotiations.[3] Intercession is the name for the interference consisting in friendly advice given or friendly offers made with regard to the domestic affairs of another State.

[1] The so-called doctrine of non-intervention as defended by some Italian writers (see Fiore, I. No. 565), who deny that intervention is ever justifiable, is a political doctrine without any legal basis whatever.

[2] Many writers constantly commit this confusion.

[3] See below, vol. II. § 9.

And, lastly, co-operation is the appellation of such interference as consists in help and assistance lent by one State to another at the latter's request for the purpose of suppressing an internal revolution. Thus, for example, Russia sent troops in 1849, at the request of Austria, into Hungary to assist Austria in suppressing the Hungarian revolt.

Intervention by Right.

§ 135. It is apparent that such interventions as take place by right must be distinguished from others. Wherever there is no right to intervention, although it may be admissible and excused, an intervention violates either the external independence or the territorial or the personal supremacy. But if an intervention takes place by right, it never contains such a violation, because the right of intervention is always based on a legal restriction upon the independence or territorial or personal supremacy of the State concerned, and because the latter is in duty bound to submit to the intervention. Now a State may have a right of intervention against another State for several grounds. Thus the Suzerain State has a right to intervene in many affairs of the vassal, and the State which holds a protectorate has a right to intervene in all the external affairs of the protected State. Thus, secondly, the right of protection over its citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit. Thus, thirdly, if a State which is restricted by an international treaty in its internal independence or its territorial or personal supremacy, does not comply with the restrictions concerned, the other party or parties have a right to intervene. Thus, fourthly, if an external affair of a State is at the same time by right an affair of another State, the latter has a right to intervene in

case the former deals with that affair unilaterally.[1] Thus, fifthly, if a State in time of peace or war violates those principles of the Law of Nations which are universally recognised, other States have a right to intervene and to make the delinquent submit to the respective principles.[2]

The question is disputed whether a State that has guaranteed by treaty the form of government of a State or the reign of a certain dynasty over the same has a right to intervene in case of change of form of government or of dynasty. In strict law this question is, I think, to be answered in the affirmative,[3] provided the respective treaty of guaranty was concluded between the respective States, and not between their monarchs. And this question has nothing to do with the policy of intervention in the interest of legitimacy adopted in the nineteenth century after the downfall of Napoleon I. by the Powers of the Holy Alliance.

[1] The events of 1878 provide an illustrative example. Russia had concluded the preliminary Peace of San Stefano with defeated Turkey; Great Britain protested because the conditions of this peace were inconsistent with the treaty of Paris of 1856 and the convention of London of 1871, and Russia agreed to the meeting of the Congress of Berlin for the purpose of arranging matters. Had Russia persisted in carrying out the preliminary peace, Great Britain as well as other signatory Powers of the Treaty of Paris and the Convention of London doubtless possessed a right of intervention.

[2] This is universally recognised. If, for instance, a State undertook to extend its jurisdiction over the merchantmen of another State on the high seas, not only would this be an affair between the two States concerned, but all other States would have a right to intervene because the freedom of the open sea is a universally recognised principle.

[3] Hall (§ 93) decides the question in the negative. I do not see the reason why a State should not be able to undertake the obligation to retain a certain form of government or dynasty. That historical events can justify such State in considering itself no longer bound by such treaty according to the principle *rebus sic stantibus* (see below, § 539) is another matter.

Admissibility of Intervention in default of Right.

§ 136. In contradistinction to intervention by right, there are other interventions which must be considered admissible, although they violate the independence or the territorial or personal supremacy of the State concerned, and although such State has by no means any legal duty to submit patiently and suffer the intervention. Of such interventions in default of right there are two kinds generally admitted and excused—namely, such as are necessary in self-preservation and such as are in the interest of the balance of power.

(1) As regards interventions for the purpose of self-preservation, it is obvious that, if any necessary violation committed in self-preservation of the International Personality of other States is, as shown above (§ 130), excused, such violation must also be excused as is contained in an intervention. And it matters not whether such an intervention exercised in self-preservation is provoked by an actual or imminent intervention on the part of a third State, or by some other incident.

(2) As regards intervention in the interest of the balance of power, it is likewise obvious that it must be excused. An equilibrium between the members of the Family of Nations is an indispensable condition of the very existence of International Law. If the States could not keep one another in check, all Law of Nations would soon disappear, as, naturally, an over-powerful State would tend to act according to discretion instead of according to law. Since the Westphalian Peace of 1648 the principle of balance of power has played a preponderant part in the history of Europe. It found express recognition in 1713 in the Treaty of Peace of Utrecht, it was the guiding star at the Vienna Congress in 1815 when

the map of Europe was re-arranged, at the Congress of Paris in 1856, the Conference of London in 1867, and the Congress of Berlin in 1878. The States themselves and the majority of writers agree upon the admissibility of intervention in the interest of balance of power. Most of the interventions exercised in the interest of the preservation of the Turkish Empire must, in so far as they are not based on treaty rights, be classified as interventions in the interest of balance of power. Examples of this are supplied by collective interventions exercised by the Powers in 1886 for the purpose of preventing the outbreak of war between Greece and Turkey, and in 1897 during the war between Greece and Turkey with regard to the island of Crete.

Intervention in the interest of Humanity.

§ 137. Many jurists maintain that intervention is likewise admissible, or even has a basis of right, when exercised in the interest of humanity for the purpose of stopping religious persecution and endless cruelties in time of peace and war. That the Powers have in the past exercised intervention on these grounds, there is no doubt. Thus Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey, because public opinion was horrified at the cruelties committed during this struggle. And many a time interventions have taken place to stop the persecution of Christians in Turkey. But whether there is really a rule of the Law of Nations which admits such interventions may well be doubted. Yet, on the other hand, it cannot be denied that public opinion and the attitude of the Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognise the rule that interventions in the interests of humanity are admis-

sible provided they are exercised in the form of a *collective* intervention of the Powers.[1]

Intervention *de facto* a Matter of Policy.

§ 138. Careful analysis of the rules of the Law of Nations regarding intervention and the hitherto exercised practice of intervention make it apparent that intervention is *de facto* a matter of policy just like war. This is the result of the combination of several factors. Since, even in the cases in which it is based on a right, intervention is not compulsory, but is solely in the discretion of the State concerned, it is for that reason alone a matter of policy. Since, secondly, every State must decide for itself whether vital interests of its own are at stake and whether a case of necessity in the interest of self-preservation has arisen, intervention is for this part again a matter of policy. Since, thirdly, the question of balance of power is so complicated and the historical development of the States involves gradually an alteration of the division of power between the States, it must likewise be left to the appreciation of every State whether or not it considers the balance of power endangered and, therefore, an intervention necessary. And who can undertake to lay down a hard and fast rule with regard to the amount of inhumanity on the part of a Government to admit of intervention according to the Law of Nations?

No State will ever intervene in the affairs of another, if it has not some important interest in doing so, and it has always been easy for such State to find or pretend some legal justification for an intervention, be it self-preservation, balance of power, or humanity. There is no great danger to the wel-

[1] See Hall, §§ 91 and 95, where the merits of the problem are discussed from all sides. See also below, § 292.

fare of the States in the fact that intervention is *de facto* a matter of policy. Too many interests are common to all the members of the Family of Nations, and too great is the natural jealousy between the Great Powers, for an abuse of intervention on the part of one powerful State without calling other States into the field. Since unjustified intervention violates the very principles of the Law of Nations, and since, as I have stated above (§ 135), in case of a violation of these principles on the part of a State every other State has a right to intervene, any unjustifiable intervention by one State in the affairs of another gives a right of intervention to all other States. Thus it becomes here, as elsewhere, apparent that the Law of Nations is intimately connected with the interests of all the States, and that they must themselves secure the maintenance and realisation of this law. This condition of things tends naturally to hamper more the ambitions of weaker States than those of the single Great Powers, but it seems unalterable.

The Monroe Doctrine.

§ 139. The *de facto* political character of the whole matter of intervention becomes clearly apparent through the so-called Monroe doctrine[1] of the United States of America. This doctrine, in its first appearance, is indirectly a product of the policy of intervention in the interest of legitimacy which the Holy Alliance pursued in the beginning of the nineteenth century after the downfall of Napoleon. The Powers of this alliance were inclined to extend their policy of intervention to America and to assist Spain in regaining her hold over the former Spanish

[1] Wharton, § 57; Dana's Note No. 36 to Wharton, p. 36; Tucker, The Monroe Doctrine (1885); Moore, The Monroe Doctrine (1895); Cespedès, La doctrine de Monroe (1893); Beaumarchais, La doctrine de Monroe (1898); Redaway, The Monroe Doctrine (1898); Pékin, Les États-Unis et la doctrine de Monroe (1900).

colonies in South America which had declared and maintained their independence, and which were recognised as independent Sovereign States by the United States of America. To meet and to check the imminent danger, President James Monroe delivered his celebrated Message to Congress on December 2, 1823. This Message contains two quite different, but nevertheless important, declarations.

(1) In connection with the unsettled boundary lines in the north-west of the American continent, the Message declared "that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonisation by any European Power." This declaration was never recognised by the European Powers, and Great Britain and Russia protested expressly against it. In fact, however, no occupation of American territory has since then taken place on the part of a European State.

(2) In regard to the contemplated intervention of the Holy Alliance between Spain and the South American States, the Message declared that the United States had not intervened, and never would intervene, in wars in Europe, but could not, on the other hand, in the interest of her own peace and happiness, allow the allied European Powers to extend their political system to any part of America and try to intervene in the independence of the South American republics.

(3) Since the time of President Monroe, the Monroe doctrine has gradually been somewhat extended in so far as the United States claims a kind of political hegemony over all the States of the American continent. Whenever a conflict occurs between such an American State and a European Power, the United States is ready to exercise intervention.

Through the civil war her hands were bound in the sixties of the last century, and she could not prevent the combined action of Great Britain, Spain, and France in Mexico. She did, further, not intervene in 1902 when Great Britain, Germany, and Italy took combined action against Venezuela, because she was cognisant of the fact that this action intended merely to make Venezuela comply with her international duties. But she intervened in 1896 in the boundary conflict between Great Britain and Venezuela when Lord Salisbury had sent an *ultimatum* to Venezuela, and she retains the Monroe doctrine as a matter of principle.

Merits of the Monroe Doctrine.

§ 140. The importance of the Monroe doctrine is of a political, not of a legal character. Since the Law of Nations is a law between all the civilised States as equal members of the Family of Nations, the States of the American continent are subjects of the same international rights and duties as the European States. The European States are, as far as the Law of Nations is concerned, absolutely free to acquire territory in America as elsewhere. And the same legal rules are valid concerning intervention on the part of European Powers both in American affairs and in affairs of other States. But it is evident that the Monroe doctrine, as the guiding star of the policy of the United States, is of the greatest *political* importance. And it ought not to be maintained that this policy is in any way inconsistent with the Law of Nations. In the interest of balance of power in the world, the United States considers it a necessity that European Powers should not acquire more territory on the American continent than they actually possess. She considers, further, her own welfare so intimately connected with that of the other American States that she thinks it necessary, in

the interest of self-preservation, to watch closely the relations of these States with Europe and also the relations between these very States, and eventually to intervene in conflicts. Since every State must decide for itself whether and where vital interests of its own are at stake and whether the balance of power is endangered to its disadvantage, and since, as explained above (§ 138), intervention is therefore *de facto* a matter of policy, there is no legal impediment to the United States carrying out a policy in conformity with the Monroe doctrine. This policy hampers indeed the South American States, but with their growing strength it will gradually disappear. For, whenever some of these States become Great Powers themselves, they will no longer submit to the political hegemony of the United States, and the Monroe doctrine will have played its part.

VII

Intercourse

Grotius, II. c. 2, § 13—Vattel, II. §§ 21-26—Hall, § 13—Taylor, § 160—Bluntschli, § 381 and p. 26—Hartmann, § 15—Heffter, §§ 26 and 33—Holtzendorff in Holtzendorff, II. pp. 60-64—Gareis, § 27—Liszt, § 7—Ullmann, § 29—Bonfils, Nos. 285-289—Despagnet, No. 183- Pradier-Fodéré, I. No. 184—Rivier, I. pp. 262-264—Calvo, III. §§ 1303-1305—Fiore, I. No. 370—Martens, I. § 79.

Intercourse a presupposition of International Personality.

§ 141. Many adherents of the doctrine of fundamental rights include therein also a right of intercourse of every State with all others. This right of intercourse is said to contain a right of diplomatic, commercial, postal, telegraphic intercourse, of intercourse by railway, a right of foreigners to travel and reside on the territory of every State,

and the like. But if the real facts of international life are taken into consideration, it becomes at once apparent that such a fundamental right of intercourse does not exist. All the consequences which are said to follow out of the right of intercourse are not at all consequences of a right, but nothing else than consequences of the fact that intercourse between the States is a condition without which a Law of Nations would not and could not exist. The civilised States make a community of States because they are knit together through their common interests and the manifold intercourse which serves these interests. Through the intercourse with one another and with the growth of their common interests the Law of Nations has grown up among the civilised States. Where there is no intercourse there cannot be a community and a law for such community. A State cannot be a member of the Family of Nations and an International Person, if it has no intercourse whatever with at least one or more other States. Varied intercourse with other States is a necessity for every civilised State. The mere fact that a State is a member of the Family of Nations shows that it has various intercourse with other States, for otherwise it would never have become a member of that family. Intercourse is therefore one of the characteristics of the position of the States within the Family of Nations, and it may be maintained that intercourse is a presupposition of the international Personality of every State. But no special right or rights of intercourse exist according to the Law of Nations between the States. It is because such special rights of intercourse do not exist that the States conclude special treaties regarding matters of post, telegraphs, telephones, railways, and commerce.

Most States keep up protective duties to exclude foreign trade from or to hamper it within their own borders in the interest of their home commerce, industry, and agriculture. And although regularly they allow foreigners to travel and to reside on their territory, they can expel every foreign subject according to discretion.

Consequences of Intercourse as a Presupposition of International Personality.

§ 142. Intercourse being a presupposition of International Personality, the Law of Nations favours intercourse in every way. The whole institution of legation serves the interest of intercourse between the States, as does the consular institution. The right of legation,[1] which every full-Sovereign State undoubtedly holds, is held in the interest of intercourse, as is certainly the right of protection over citizens abroad[2] which every State possesses. The freedom of the Open Sea,[3] which has been universally recognised since the end of the first quarter of the nineteenth century, the right of every State to the passage of its merchantmen through the maritime belt[4] of all other States, and, further, freedom of navigation for the merchantmen of all nations on so-called international rivers,[5] are further examples of provisions of the Law of Nations in the interest of international intercourse.

The question is frequently discussed and answered in the affirmative whether a State has the right to require such States as are outside the Family of Nations to open their ports and allow commercial intercourse. Since the Law of Nations is a law between those States only which are members of the Family of Nations, it has certainly nothing to do

[1] See below, § 360.

[2] See below, § 319. The right of protection over citizens abroad is frequently said to be a special right of self-preservation, but it is really a right in the interest of intercourse.

[3] See below, § 259.

[4] See below, § 188.

[5] See below, § 178.

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with this question, which is therefore one of mere commercial policy and of morality.

VIII

Jurisdiction

Hall, §§ 62, 75–80—Westlake, I. pp. 236–271—Lawrence, §§ 117–133—Phillimore, I. §§ 317–356—Twiss, I. §§ 157–171—Halleck, I. pp. 186–245—Taylor, §§ 169–171—Wheaton, §§ 77–151—Bluntschli, §§ 388–393—Heffter, §§ 34–39—Bonfils, Nos. 263–266—Rivier, I. § 28—Fiore, I. Nos. 475–588.

Jurisdiction important for the position of the States within the Family of Nations.

§ 143. Jurisdiction is a matter of importance as regards the position of the States within the Family of Nations for several reasons. States possessing independence and territorial as well as personal supremacy can naturally extend or restrict their jurisdiction as far as they like. However, as members of the Family of Nations and International Persons, the States must exercise self-restraint in the exercise of this natural power in the interest of one another. Since intercourse of all kinds takes place between the States and their subjects, the matter ought to be thoroughly regulated by the Law of Nations. But such regulation has as yet only partially grown up. The consequence of both the regulation and non-regulation of jurisdiction is that concurrent jurisdiction of several States can often at the same time be exercised over the same persons and matters. And it can also happen that matters fall under no jurisdiction because the several States which could extend their jurisdiction over these matters refuse to do so, leaving them to each other's jurisdiction.

Restrictions upon Territorial Jurisdiction.

§ 144. As all persons and things within the territory of a State fall under its territorial supremacy, every State has jurisdiction over them. The Law of

Nations, however, gives a right to every State to claim so-called exterritoriality and therefore exemption from local jurisdiction chiefly for its head,[1] its diplomatic envoys,[2] its men-of-war,[3] and its armed forces[4] abroad. And partly by custom and partly by treaty obligations, Eastern non-Christian States, Japan now excepted, are restricted[5] in their territorial jurisdiction with regard to foreign resident subjects of Christian Powers.

Jurisdiction over Citizens abroad.

§ 145. The Law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy. As every State can also exercise jurisdiction over foreigners[6] within its boundaries, such foreigners are often under two concurrent jurisdictions. And, since a State is not obliged to exercise jurisdiction for all matters over foreigners on its territory, and since the home State is not obliged to exercise jurisdiction over its subjects abroad, it may happen that foreigners are actually for some matters under no State's jurisdiction.

Jurisdiction on the Open Sea.

§ 146. As the Open Sea is not under the sway of any State, no State can exercise its jurisdiction there. But it is a rule of the Law of Nations that the vessels and the things and persons thereon remain during the time they are on the Open Sea under the jurisdiction of the State under whose flag they sail.[7] It is another rule of the Law of Nations, that piracy[8] on the Open Sea can be punished by any State, whether the pirate sails under the flag of a State at all or not. Again, in the interest of the safety of the Open Sea,

[1] Details below, §§ 348–353, and 356.
[2] Details below, §§ 385–405.
[3] Details below, §§ 450–451.
[4] Details below, § 445.
[5] Details below, §§ 318 and 440.
[6] See below, § 317.
[7] See below, § 260.
[8] See below, § 278.

every State has the right to order its men-of-war to ask any suspicious merchantman they meet on the Open Sea to show the flag, to arrest foreign merchantmen sailing under its flag without an authorisation for its use, and to pursue into the Open Sea and to arrest there such foreign merchantmen as have committed a violation of its law whilst in its ports or maritime belt.[1] Lastly, in time of war belligerent States have the right to order their men-of-war to visit, search, and eventually capture on the Open Sea all neutral vessels for contraband, breach of blockade, and maritime services to the enemy.

Criminal Jurisdiction over Foreigners in Foreign States.

§ 147. Many States claim jurisdiction and threaten punishments for certain acts committed by a foreigner in foreign countries.[2] States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, forging bank-notes, and the like, or against its citizens, such as murder or arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the committal of such act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of enforcing punishment. The question is, therefore, whether States have a right to jurisdiction over acts of foreigners committed in foreign countries, and whether the home State of such a foreigner has a duty to acquiesce in the latter's punishment in case he comes into the power of these States. The question must be answered in the negative. For at the time such criminal acts are committed the perpetrators are

[1] See below, §§ 265–266.

[2] See Hall, § 62; Westlake, I. pp. 251–253; Lawrence, § 125; Taylor, § 191; Philimore, I. § 334.

neither under the territorial nor under the personal supremacy of the States concerned. And a State can only require respect for its laws from such foreigners as are permanently or transiently within its territory. No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations, and the right of protection over citizens abroad held by every State would justify it in an intervention in case one of its citizens abroad should be required to stand his trial before the Courts of another State for criminal acts which he did not commit during the time he was under the territorial supremacy of such State.[1] In the only case which is reported—namely, in the case of Cutting—matters were settled according to this view. In 1886, one A. K. Cutting, a subject of the United States, was arrested in Mexico for an alleged libel against one Emigdio Medina, a subject of Mexico, which was published in the newspaper of El Paso in Texas. Mexico maintained that she had a right to punish Cutting because according to her Criminal Law offences committed by foreigners abroad against Mexican subjects are punishable in Mexico. The United States, however, intervened and demanded Cutting's release, which was finally granted.[2]

[1] The Institute of International Law has studied the question at several meetings and in 1883, at its meeting at Munich (see Annuaire, VII. p. 156), among a body of fifteen articles concerning the conflict of the Criminal Laws of different States, adopted the following (article 8):—"Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence or endanger its security and when they are not provided against by the Criminal Law of the territory where they take place." But it must be emphasised that this resolution has value *de lege ferenda* only.

[2] See Taylor, § 192.

CHAPTER III

RESPONSIBILITY OF STATES

I

On State Responsibility in General

Grotius, II. c. 21, § 2—Pufendorf, VIII. c. 6, § 12—Vattel, II. §§ 63-78—Hall, § 65—Halleck, I. pp. 440-444—Wharton, I. § 21—Wheaton, § 32—Bluntschli, § 74—Heffter, §§ 101-104—Holtzendorff in Holtzendorff, II. pp. 70-74—Liszt, § 24—Ullmann, § 74—Bonfils, Nos. 324-332—Piedelièvre, I. pp. 317-322—Pradier-Fodéré, I. Nos. 196-210—Rivier, I. pp. 40-44—Calvo, III. §§ 1261-1298—Fiore, I. Nos. 659-679—Martens, I. § 118—Clunet, "Offenses et actes hostiles commis par particuliers contre un état étranger" (1887).—Triepel, "Völkerrecht und Landesrecht" (1899), pp. 324-381—Anzillotti, "Teoria generale della responsabilità dello stato nel diritto internazionale" (1902)—Rougier, "Les guerres civiles et le droit des gens" (1903), pp. 448-474.

Nature of State Responsibility.

§ 148. It is often maintained that a State, as a sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of a State towards its subjects. Since a State can abolish parts of its Municipal Law and can make new Municipal Law, it can always avoid legal, although not moral, responsibility by a change of Municipal Law. Different from this internal autocracy is the external responsibility of a State to fulfil its international legal duties. Responsibility for such duties is, as will be remembered,[1] a quality of every State as an International Person, without which the Family of Nations could not peaceably exist. Although there is no International Court

[1] See above, § 113.

of Justice which could establish such responsibility and pronounce a fine or other punishment against a State for neglect of its international duties, State responsibility concerning international duties is nevertheless a *legal* responsibility. For a State cannot abolish or create new International Law in the same way as it can abolish or create new Municipal Law. A State, therefore, cannot renounce its international duties unilaterally[1] at discretion, but is and remains legally bound by them. And although there is not and never will be a central authority above the single States to enforce the fulfilment of these duties, there is the legalised self-help of the single States against one another. For every neglect of an international legal duty constitutes an international delinquency,[2] and the violated State can through reprisals or even war compel the delinquent State to comply with its international duties.

Original and vicarious State Responsibility.

§ 149. Now if we examine the various international duties out of which responsibility of a State may rise, we find that there is a necessity for two different kinds of State responsibility to be distinguished. They may be named "original" in contradistinction to "vicarious" responsibility. I name as "original" the responsibility borne by a State for its own—that is, its Government's actions, and for such actions of the lower organs or private individuals as are performed at the Government's command or with its authorisation. But States have to bear another responsibility besides that just mentioned. For States are, according to the Law of Nations, in a sense

[1] See Annex to Protocol I. of Conference of London, 1871, where the Signatory Powers proclaim that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting Powers by means of an amicable arrangement."

[2] See below, § 151.

responsible for certain acts other than their own—namely, certain unauthorised injurious acts of their organs, of their subjects, and even of such foreigners as are for the time living within their territory. This responsibility of States for acts other than their own I name "vicarious" responsibility. Since the Law of Nations is a law between States only, and since States are the sole exclusive subjects of International Law, individuals are mere objects[1] of International Law, and the latter is unable to confer directly rights and duties upon individuals. And for this reason the Law of Nations must make every State in a sense responsible for certain internationally injurious acts committed by its officials, subjects, and such foreigners as are temporarily resident on its territory.

Essential Difference between Original and Vicarious Responsibility.

§ 150. It is, however, obvious that original and vicarious State responsibility are essentially different. Whereas the one is responsibility of a State for a neglect of its own duty, the other is not. A neglect of international legal duties of a State constitutes an international delinquency. The responsibility which a State bears for such delinquency is especially grave, and requires, apart from other especial consequences, a formal expiatory act, such as an apology at least, by the delinquent State to repair the wrong done. On the other hand, the vicarious responsibility which a State bears requires chiefly compulsion to make those officials or other individuals who have committed internationally injurious acts repair as far as possible the wrong done, and punishment, if necessary, of the wrong-doers. In case a State complies with these requirements, no blame falls upon it on account of such injurious acts. But of course, in case

[1] See below, § 290.

a State refuses to comply with these requirements, it commits thereby an international delinquency, and its hitherto vicarious responsibility turns *ipso facto* into original responsibility.

II

State Responsibility for International Delinquencies

See the literature quoted above at the commencement of § 148.

Conception of International Delinquencies.

§ 151. International delinquency is every injury to another State committed by the head and the Government of a State through neglect of an international legal duty. Equivalent to acts of the head and Government are acts of officials or other individuals commanded or authorised by the head or Government.

An international delinquency is not a crime, because the delinquent State, as a Sovereign, cannot be punished, although compulsion may be exercised to procure a reparation of the wrong done.

International delinquencies in the technical sense of the term must not be confounded either with so-called "Crimes against the Law of Nations" or with so-called "International Crimes." "Crimes against the Law of Nations" in the wording of many Criminal Codes of the single States are such acts of individuals against foreign States as are rendered criminal by these Codes. Of these acts, the gravest are those for which the State on whose territory they are committed bears a vicarious responsibility according to the Law of Nations. "International Crimes," on the other hand, refer to crimes like piracy on the high

seas or slave trade, which either every State can punish on seizure of the criminals, of whatever nationality they may be, or which every State has by the Law of Nations a duty to prevent.

An international delinquency must, further, not be confounded with discourteous and unfriendly acts. Although such acts may be met by retorsion, they are not illegal and therefore not delinquent acts.

Subjects of International Delinquencies.

§ 152. An international delinquency may be committed by every member of the Family of Nations, be such member a full-Sovereign, half-Sovereign, or part-Sovereign State. Yet, half- and part-Sovereign States can commit international delinquencies in so far only as they have a footing within the Family of Nations, and therefore international duties of their own. And even then the circumstances of each case decide whether the delinquent has to account for its neglect of an international duty directly to the wronged State, or whether it is the full-Sovereign State (suzerain, federal, or protectorate-exercising State) to which the delinquent State is attached that must bear a vicarious responsibility for the delinquency. On the other hand, so-called Colonial States without any footing whatever within the Family of Nations and, further, the member-States of the American Federal States, which likewise lack any footing whatever within the Family of Nations because all their possible international relations are absorbed by the respective Federal States, cannot commit an international delinquency. Thus an injurious act against France committed by the Government of the Commonwealth of Australia or by the Government of the State of California in the United States of America, would not be an international delinquency in the technical sense of the term, but

merely an internationally injurious act for which Great Britain or the United States of America must bear a vicarious responsibility.

State Organs able to commit International Delinquencies.

§ 153. Since States are juristic persons, the question arises, Whose internationally injurious acts are to be considered State acts and therefore international delinquencies? It is obvious that acts of this kind are, first, all such acts as are performed by the heads of States or by the members of Government acting in that capacity, so that their acts appear as State acts. Acts of such kind are, secondly, all acts of officials or other individuals which are either commanded or authorised by Governments. On the other hand, unauthorised acts of corporations, such as Municipalities, or of officials, such as magistrates or even ambassadors, or of private individuals, never constitute an international delinquency. And, further, all acts committed by heads of States and members of Government outside their official capacity, simply as individuals who act for themselves and not for the State, are not international delinquencies either.[1] The States concerned must certainly bear a vicarious responsibility for all such acts, but for that very reason these acts comprise not international delinquencies.

No International Delinquency without Malice or culpable Negligence.

§ 154. An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence. Therefore, an act of a State committed by right or prompted by self-preservation in necessary self-defence does not contain an international delinquency, however injurious it may actually be to another State. And the same is valid in regard to acts of officials or other individuals

[1] See below, §§ 157–158.

committed by command or with the authorisation of a Government.

Objects of International Delinquencies.

§ 155. International delinquencies may be committed against so many different objects that it is impossible to enumerate them. It suffices to give some striking examples. Thus a State may be injured—in regard to its independence through an unjustified intervention; in regard to its territorial supremacy through a violation of its frontier; in regard to its dignity through disrespectful treatment of its head or its diplomatic envoys; in regard to its personal supremacy through forcible naturalisation of its citizens abroad; in regard to its treaty rights through an act violating a treaty. A State may also suffer various injuries in time of war by illegitimate acts of warfare, or by a violation of neutrality on the part of a neutral State in favour of the other belligerent. And a neutral may in time of war be injured in various ways through a belligerent violating neutrality by acts of warfare within the neutral State's territory; for instance, through a belligerent man-of-war attacking an enemy vessel in a neutral port or in neutral territorial waters, or through a belligerent violating neutrality by acts of warfare committed on the Open Sea against neutral vessels.

Legal consequences of International Delinquencies.

§ 156. The nature of the Law of Nations as a law between, not above, Sovereign States excludes the possibility of punishing a State for an international delinquency and of considering the latter in the light of a crime. The only legal consequences of an international delinquency that are possible under existing circumstances are such as create a reparation of the moral and material wrong done. The merits and the conditions of the special cases are, however, so

different that it is impossible for the Law of Nations to prescribe once for all what legal consequences an international delinquency should have. The only rule which is unanimously recognised by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such expiatory acts as are necessary for a reparation of the wrong done. What kind of acts these are, depends upon the special case and the discretion of the wronged State. At least a formal apology on the part of the delinquent State will be necessary, and it is obvious that there must be a pecuniary reparation for a material damage. The apology may have to take the form of some ceremonial act, such as a salute to the flag or to the coat of arms of the wronged State, the mission of a special embassy bearing apologies, and the like. A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, on the one hand, and on the other, for such as arise merely from culpable negligence.

When the delinquent State refuses reparation of the wrong done, the wronged State can exercise such means as are necessary to enforce an adequate reparation. In case of international delinquencies committed in time of peace, such means are reprisals [1] (including embargo and pacific blockade) and war as the case may require. On the other hand, in case of international delinquencies committed in time of war through illegitimate acts of warfare on the part of a belligerent, such means are reprisals and the taking of hostages.[2]

[1] See below, vol. II. § 34. [2] See below, vol. II. §§ 248 and 259.

III

State Responsibility for Acts of State Organs

See the literature quoted above at the commencement of § 148.

Responsibility varies with Organs concerned.

§ 157. States must bear vicarious responsibility for all internationally injurious acts of their organs. As, however, these organs are of different kinds and of different position, the actual responsibility of a State for acts of its organs varies with the organs concerned. It is therefore necessary to distinguish between internationally injurious acts of heads of States, members of Government, diplomatic envoys, parliaments, judicial functionaries, administrative officials, and military and naval forces.

Internationally injurious Acts of Heads of States.

§ 158. Such international injurious acts as are committed by heads of States in the exercise of their official functions are here not our concern, because they constitute international delinquencies which have been discussed above (§§ 151–156). But a monarch can, just as any other individual, in his private life commit many internationally injurious acts, and the question is, whether and in what degree a State must bear responsibility for such acts of its head. The position of a head of a State, who is within and without his State neither under the jurisdiction of a Court of Justice nor under any kind of disciplinary control, makes it a necessity for the Law of Nations to claim a certain vicarious responsibility from States for internationally injurious acts committed by their heads in private life. Thus, for instance, when a monarch during his stay abroad commits an act injurious to the property of a foreign subject and refuses adequate reparation, his State may be requested to pay damages on his behalf.

§ 159. As regards internationally injurious acts of members of a Government, a distinction must be made between such acts as are committed by the offenders in their official capacity and other acts. Acts of the first kind constitute international delinquencies, as stated above (§ 153). But members of a Government can in their private life perform as many internationally injurious acts as private individuals, and we must ascertain therefore what kind of responsibility their State must bear for such acts. Now, as members of a Government have not the exceptional position of heads of States and are therefore, under the jurisdiction of the ordinary Courts of Justice, there is no reason why their State should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

Internationally injurious Acts of Members of Government.

§ 160. The position of diplomatic envoys who, as representatives of their home State, enjoy the privileges of exterritoriality, gives, on the one hand, a very great importance to internationally injurious acts committed by them on the territory of the receiving State, and, on the other hand, excludes the jurisdiction of the receiving State over such acts. The Law of Nations makes therefore the home State in a sense responsible for all acts of an envoy injurious to the State or its subjects in whose territory he resides. But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged State. Thus, for instance, a crime committed by the envoy on the territory of the receiving State must be punished by his home State, and according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologise

Internationally injurious Acts of Diplomatic Envoys.

or express its regret for his behaviour, or to pay damages. It must, however, be remembered that such injurious acts as an envoy performs at the command or with the authorisation of the home State, constitute international delinquencies for which the home State bears original responsibility and for which the envoy cannot personally be blamed.

Internationally injurious Attitudes of Parliaments.

§ 161. As regards internationally injurious attitudes of parliaments, it must be kept in mind that, most important as may be the part parliaments play in the political life of a nation, they do not belong to the organs which represent the States in their international relations with other States. Therefore, however injurious to a foreign State an attitude of a parliament may be, it can never constitute an international delinquency. That, on the other hand, all States must bear vicarious responsibility for such attitudes of their parliaments, there can be no doubt. But, although the position of a Government is difficult in such cases, especially in States that have a representative Government, this does not concern the wronged State, which has a right to demand satisfaction and reparation for the wrong done.

Internationally injurious Acts of Judicial Functionaries.

162. Internationally injurious acts committed by judicial functionaries in their private life are in no way different from such acts committed by other individuals. But these functionaries may in their official capacity commit such acts, and the question is how far a State's vicarious responsibility for acts of its judicial functionaries can reasonably be extended in face of the fact that in modern civilised States these functionaries are to a great extent independent of their Government.[1] Undoubtedly,

[1] Wharton, II. §§ 230, comprises abundant and instructive material on this question.

in case of such denial or undue delay of justice by the Courts as is internationally injurious, a State must find means to exercise compulsion against such Courts. And the same is valid with regard to an obvious and malicious act of misapplication of the law by the Courts which is injurious to another State. But if a Court observes its own proper forms of justice and nevertheless pronounces a materially unjust judgment, matters become so complicated that there is hardly a peaceable way in which the injured State can successfully obtain reparation for the wrong done, and eventually war may break out between the respective States.

Internationally injurious Acts of administrative Officials and Military and Naval Forces.

§ 163. Internationally injurious acts committed in the exercise of their official functions by administrative officials and military and naval forces of a State without that State's command or authorisation, are not international delinquencies because they are not State acts. But a State bears a wide, unlimited, and unrestricted vicarious responsibility for such acts because its administrative officials and military and naval forces are under its disciplinary control, and because all acts of such officials and forces in the exercise of their official functions are *prima facie* acts of the respective State. Therefore, a State has, first of all, to disown and disapprove of such acts by expressing its regret or even apologising to the Government of the injured State; secondly, damages must be paid where required; and, lastly, the offenders must be punished according to the merits of the special case.

As regards the question what kind of acts of administrative officials and military and naval forces are of an internationally injurious character, the rule may safely be laid down that such acts of these

subjects are internationally injurious as would constitute international delinquencies when committed by the State itself or with its authorisation. A very instructive case may be quoted as an illustrative example. On September 26, 1887, a German soldier on sentry duty at the frontier near Vexaincourt shot from the German side and killed an individual who was on French territory. As this act of the sentry violated French territorial supremacy, Germany disowned and apologised for it and paid a sum of 50,000 francs to the widow of the deceased as damages. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood.[1]

But it must be specially emphasised that a State never bears any responsibility for losses sustained by foreign subjects through *legitimate* acts of administrative officials and military and naval forces. Individuals who enter foreign territory submit themselves to the law of the land, and their home State has no right to request that they should be otherwise treated than as the law of the land authorises a State to treat its own subjects. Therefore, since the Law of Nations does not prevent a State from expelling foreigners, the home State of an expelled foreigner cannot request the expelling State to pay damages for the losses sustained by the expelled through his having to leave the country. Therefore, further, a State need not make any reparation for losses sustained by a foreigner through legitimate measures taken by administrative officials and military forces in time of war, insurrection,[2] riot, or public calamity

[1] A recent example occurred in 1904, when the Russian Baltic Fleet, on its way to the Far East during the Russo-Japanese war, fired upon the Hull Fishing Fleet off the Dogger Bank. (See below, vol. II. § 5.)

[2] See below, § 167.

such as a fire, an epidemic outbreak of dangerous disease, and the like.

IV

State Responsibility for Acts of Private Persons

See the literature quoted above at the commencement of § 148.

Vicarious in contradistinction to original State Responsibility for Acts of Private Persons.

§ 164. As regards State responsibility for acts of private persons, it is first of all necessary not to confound the original with the vicarious responsibility of States for internationally injurious acts of private persons. International Law imposes the duty upon every State to prevent as far as possible its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States. A State which either intentionally and maliciously or through culpable negligence does not comply with this duty commits an international delinquency for which it has to bear original responsibility. But it is practically impossible for a State to prevent all injurious acts which a private person might commit against a foreign State. It is for that reason that a State must, according to International Law, bear vicarious responsibility for such injurious acts of private individuals as are incapable of prevention.

Vicarious responsibility for Acts of Private Persons relative only.

§ 165. Now, whereas the vicarious responsibility of States for official acts of administrative officials and military and naval forces is unlimited and unrestricted, their vicarious responsibility for acts of private persons is only relative. For their sole duty is to procure satisfaction and reparation for the wronged State as far as possible by punishing the offenders and compelling them to pay damages

where required. Beyond this limit a State is not responsible for acts of private persons; there is in especial no duty of a State itself to pay damages for such acts if the offenders are not able to do it.

Municipal Law for Offences against Foreign States.

§ 166. It is a consequence of the vicarious responsibility of States for acts of private persons that by the Criminal Law of every civilised State punishment is severe for certain offences of private persons against foreign States, such as violation of ambassadors' privileges, libel on heads of foreign States and on foreign envoys, and other injurious acts.[1] In every case that arises the offender must be prosecuted and the law enforced by the Courts of Justice And it is further a consequence of the vicarious responsibility of States for acts of private persons that criminal offences of private persons against foreign subjects—such offences are indirectly offences against the respective foreign States because the latter exercise protection over their subjects abroad —must be punished according to the ordinary law of the land, and that the Civil Courts of Justice of the land must be accessible for claims of foreign subjects against individuals living under the territorial supremacy of such land.

Responsibility for Acts of Insurgents and Rioters.

§ 167. The vicarious responsibility of States for acts of insurgents and rioters is the same as for acts of other private individuals. As soon as peace and order are re-established, such insurgents and rioters as have committed criminal injuries against foreign States must be punished according to the law of the land. The point need not be mentioned at all were it not for the fact that, in several cases of insurrection and riots, claims have been made by foreign

[1] As regards the Criminal Law of England concerning such acts, see Stephen's Digest, articles 96–103.

States against the local State for damages for losses sustained by their subjects through acts of the insurgents or rioters respectively, and that some writers[1] assert that such claims are justified by the Law of Nations. The majority of writers maintain, correctly, I think, that the responsibility of States does not involve the duty to repair the losses which foreign subjects have sustained through acts of insurgents and rioters. Individuals who enter foreign territory must take the risk of an outbreak of insurrections or riots just as the risk of the outbreak of other calamities. When they sustain a loss from acts of insurgents or rioters, they may, if they can, trace their losses to the acts of certain individuals, and claim damages from the latter before the Courts of Justice. The responsibility of a State for acts of private persons injurious to foreign subjects reaches only so far that its Courts must be accessible to the latter for the purpose of claiming damages from the offenders, and must punish such of those acts as are criminal. And in States which, as France for instance, have such Municipal Laws as make the town or the county where an insurrection or riot has taken place responsible for the pecuniary loss sustained by individuals during those events, foreign subjects must be allowed to claim damages from the local authorities for losses of such kind. But the State itself never has by International Law a duty to pay such damages.

The practice of the States agrees with this rule laid down by the majority of writers. Although in some cases several States have paid damages for losses of such kind, they have done it, not through compulsion of law, but for political reasons. In

[1] See, for instance, Rivier, II. p. 43.

most cases in which the damages have been claimed for such losses, the respective States have refused to comply with the request.[1] As such claims have during the second half of the nineteenth century frequently been tendered against American States which have repeatedly been the scene of insurrections, several of these States have in commercial and similar treaties which they concluded with other States expressly stipulated[2] that they are not responsible for losses sustained by foreign subjects on their territory through acts of insurgents and rioters.[3]

[1] See the cases in Calvo, III. §§ 1283–1290.

[2] See Martens, N.R.G. IX. p. 474 (Germany and Mexico); XV. p. 840 (France and Mexico); XIX. p. 831 (Germany and Colombia); XXII. p. 308 (Italy and Colombia), and p. 507 (Italy and Paraguay).

[3] The Institute of International Law at its meeting at Neuchatel in 1900 adopted five rules regarding the responsibility of States with regard to this matter. See Annuaire, XVIII. p. 254.

PART II

THE OBJECTS OF THE LAW OF NATIONS

CHAPTER I

STATE TERRITORY

I

On State Territory in General

Vattel, II. §§ 79–83—Hall, § 30—Westlake, I. pp. 84–88—Lawrence, §§ 90–91—Phillimore, I. §§ 150–154—Twiss, I. §§ 140–144—Halleck, I. pp. 150–156—Taylor, § 217—Wheaton, §§ 161–163—Blunstchli, § 277—Hartmann, § 58—Holtzendorff in Holtzendorff, II. pp. 225–232—Gareis, § 18—Liszt, § 9—Ullmann, § 75—Heffter, §§ 65–68—Bonfils, No. 483—Despagnet, Nos. 385–386—Pradier-Fodéré, II. No. 612—Nys, I. pp. 402–412—Rivier, I. pp. 135–142—Calvo, I. §§ 260–262—Fiore, I. Nos. 522–530—Martens, I. § 88—Del Bon, "Proprietà territoriale degli Stati" (1867)—Fricker, "Vom Staatsgebiet" (1867.)

Conception of State Territory.

§ 168. State territory is that definite portion of the surface of the globe which is subjected to the sovereignty of the State. A State without a territory is not possible, although the necessary territory may be very small, as in the case of the Free Town of Hamburg, the Principality of Monaco, the Republic of San Marino, or the Principality of Lichtenstein. A wandering tribe, although it has a Government and is otherwise organised, is not a State before it has settled down on a territory of its own.

State territory is also named territorial property of a State. Yet it must be borne in mind that territorial property is a term of Public Law and must not be confounded with private property. The territory of a State is not the property of the

monarch, or of the Government, or even of the people of a State ; it is the country which is subjected to the territorial supremacy or the *imperium* of a State. This distinction has, however, in former centuries not been sharply drawn. In spite of the *dictum* of Seneca, "Omnia rex imperio possidet, singuli dominio," the *imperium* of the monarch and the State over the State territory has very often been identified with private property of the monarch or the State. But with the disappearance of absolutism this identification has likewise disappeared. It is for this reason that nowadays, according to the Constitutional Law of most countries, neither the monarch nor the Government is able to dispose of parts of the State territory at will and without the consent of Parliament.[1]

It must, further, be emphasised that the territory of a State is totally independent of the racial character of the inhabitants of the State. The territory is the public property of the State, and not of a nation in the sense of a race. The State community may consist of different nations, as for instance the British or the Swiss or the Austrians.

Different kinds of Territory.

§ 169. The territory of a State may consist of one piece of the surface of the globe only, such as that of Switzerland. Such kind of territory is named "integrate territory" (*territorium clausum*). But the territory of a State may also be dismembered and consist of several pieces, such as that of Great Britain. All States with colonies have a "dismembered territory."

If a territory or a piece of it is absolutely sur-

[1] In English Constitutional Law this point is not settled. The cession of the Island of Heligoland to Germany in 1890 was, however, made conditional on the approval of Parliament. (See Anson, The Law and Custom of the Constitution, II. p. 299.)

rounded by the territory of another State, it is named an "enclosure." Thus the Republic of San Marino is an enclosure of Italy, and Birkenfeld, a piece of the territory of the Grand Duchy of Oldenburg situated on the river Rhine, is an enclosure of Prussia.

Another distinction is that between motherland and colonies. Colonies rank as territory of the motherland, although they may enjoy complete self-government and therefore be called Colonial States. Thus, if viewed from the standpoint of the Law of Nations, the Dominion of Canada and the Commonwealth of Australia are British territory.

As regards the relation between the Suzerain and the Vassal State, it is certain that the vassal is not, in the strict sense of the term, a part of the territory of the suzerain. Bulgaria and Egypt are not Turkish territory, although under Turkish suzerainty. But no general rule can be laid down, as everything depends on the merits of the special case, and as the vassal, even if it has some footing of its own within the Family of Nations, is internationally for the most part considered a mere portion of the Suzerain State.[1]

Importance of State Territory.

§ 170. The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority. State territory is an object of the Law of Nations because the latter recognises the supreme authority of every State within its territory. Whatever person or thing is in or enters into that territory, is *ipso facto* subjected to the supreme authority of the respective State according to the old rules, *Quidquid est in territorio, est etiam de territorio* and *Qui in territorio meo est, etiam meus subditus est.* No foreign authority has any power within the boundaries of the home territory,

[1] See above, § 91.

although foreign Sovereigns and diplomatic envoys enjoy the so-called privilege of exterritoriality, and although the Law of Nations does, and international treaties may, restrict [1] the home authority in many points in the exercise of its sovereignty.

One Territory, one State.

§ 171. The supreme authority which a State exercises over its territory makes it apparent that on one and the same territory can exist one full-Sovereign State only. Two or more full-Sovereign States on one and the same territory are an impossibility. The following four cases, of which the Law of Nations is cognisant, are apparent, but not real, exceptions to this rule.

(1) There is, first, the case of the so-called *condominium*. It happens sometimes that a piece of territory consisting of land or water is under the joint *tenancy* of two or more States, these several States exercising sovereignty conjointly over such piece and the individuals living thereon. Thus Schleswig-Holstein and Lauenburg from 1864 till 1866 were under the *condominium* of Austria and Prussia. Thus, further, Moresnet (Kelmis), on the frontier of Belgium and Prussia, is under the *condominium* of these two States [1] because they have not yet come to an agreement regarding the interpretation of a boundary treaty of 1815 between the Netherlands and Prussia. And since 1898 the Soudan is under the *condominium* of Great Britain and Egypt. It is easy to show that in such cases there are not two States on one and the same territory, but pieces of territory, the destiny of which is not yet decided, and which are meanwhile kept separate from the territories of the interested States under a separate

[1] See above, §§ 126–128.

[2] See Schröder, Das grenzstreitige Gebiet von Moresnet, (1902).

administration. Until a final settlement the interested States do not exercise each an individual sovereignty over these pieces, but they agree upon a joint administration under their conjoint sovereignty.

(2) The second case is that of the administration of a piece of territory by a foreign Power, with the consent of the owner-State. Thus, since 1878 the Turkish provinces of Bosnia and Herzegovina have been under the administration of Austria-Hungary, as likewise since 1878 the Turkish island of Cyprus has been under British administration. In these cases practically a cession of pieces of territory has taken place, although in theory the respective pieces still belong to the former owner-State. Anyhow, it is certain that only one sovereignty is exercised over these pieces—namely, the sovereignty of the State which exercises administration.

(3) The third case is that of a piece of territory leased or pledged by the owner-State to a foreign Power. Thus, China in 1898 leased[1] the district of Kiauchav to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, and Port Arthur to Russia. Thus, further, in 1803 Sweden pledged the town of Wismar[2] to the Grand Duchy of Mecklenburg-Schwerin, and the Republic of Genoa in 1768 pledged the island of Corsica to France. All these cases contain practically, although not theoretically, cession of pieces of territory, and the same statements are valid regarding them as regarding the forementioned cases of foreign administration.

[1] See below, § 216.

[2] This transaction took place for the sum of 1,258,000 thaler, on condition that Sweden, after the lapse of 100 years, should be entitled to take back the town of Wismar on repayment of the money, with 3 per cent. interest per annum. Sweden in 1903 formally waived her right to retake the town.

(4) The fourth case is that of the territory of a Federal State. As a Federal State is considered [1] a State of its own side by side with its single member-States, the fact is apparent that the different territories of the single member-States are at the same time collectively the territory of the Federal State. But this fact is only the consequence of the other illogical fact that sovereignty is divided between a Federal State and its member-States. Two different sovereignties are here by no means exercised over one and the same territory, for so far as the Federal State possesses sovereignty the member-States do not, and *vice versa*.

II

The different Parts of State Territory

Real and Fictional parts of Territory.

§ 172. To the territory of a State belong not only the land within the State boundaries, but also the so-called territorial waters. They consist of the rivers, canals, and lakes which water the land, and, in the case of a State with a seacoast, of the maritime belt and certain gulfs, bays, and straits of the sea. These different kinds of territorial waters will be separately discussed below in §§ 176–197. In contradistinction to these real parts of State territory there are some things that are either in every point or for some part treated as though they were territorial parts of a State. They are fictional and in a sense only parts of the territory. Thus men-of-war and other public vessels on the high seas as well as in foreign territorial waters are essentially in every point

[1] See above, § 89.

treated as though they were floating parts of their home State.[1] And the houses in which foreign diplomatic envoys have their official residence are in many points treated as though they were parts of the home States of the respective envoys.[2] Again, merchantmen on the high seas are for some points treated as though they were floating parts of the territory of the State under whose flag they legitimately sail.[3]

Territorial Subsoil.

§ 173. The subsoil beneath the territorial land and water is of importance on account of telegraph and telephone wires and the like, and further on account of the working of mines and of the building of tunnels. A special part of territory the territorial subsoil is not, although this is frequently asserted. But it is a universally recognised rule of the Law of Nations that the subsoil to an unbounded depth belongs to the State which owns the territory on the surface.

Territorial Atmosphere.

§ 174. The territorial atmosphere is no more a special part of territory than the territorial subsoil, but it is of importance on account of wires for telegraphs, telephones, electric traction, and the like. It may also in the future be of special importance on account of aëronautism. It certainly cannot belong to an unbounded height to the territory of the State which owns the corresponding part of the surface of the globe, but, on the other hand, the respective State must be allowed to control it and to exercise jurisdiction in it up to a certain height. However, no customary or other rules regarding the territorial atmosphere exist as yet.[4]

[1] See below, § 450.
[2] See below, § 390.
[3] See below, § 264.
[4] The Institute of International Law is studying the matter. (See Annuaire, XIX. See also Holtzendorff, II. p. 230; Fauchille, in R.G. VIII. p. 314; Nys, I. pp. 522–533; Bonfils, Nos. 531–531[VII].)

Inalienability of Parts of Territory.

§ 175. It should be mentioned that not every part of territory is alienable by the owner State. For it is evident that the territorial waters are as much inseparable appurtenances of the land as are the territorial subsoil and atmosphere. Only pieces of land together with the appurtenant territorial waters are alienable parts of territory.[1] There is, however, one exception to this, since boundary waters[2] may wholly belong to one of the riparian States, and may therefore be transferred through cession from one to the other riparian State without the bank itself. But it is obvious that this is only an apparent, not a real, exception to the rule that territorial waters are inseparable appurtenances of the land. For boundary waters that are ceded to the other riparian State remain an appurtenance of land, although they are now an appurtenance of the one bank only.

[1] See below, § 185. [2] See below, § 199.

III

Rivers

Grotius, II. c. 2, §§ 11–15—Pufendorf, III. c. 3, § 8—Vattel, II. §§ 117, 128, 129, 134—Hall, § 39—Westlake, I. pp. 142–159—Lawrence, § 112—Phillimore, I. §§ 125–151—Twiss, I. § 145—Halleck, I. pp. 171–177—Taylor, §§ 233–241—Walker, § 16—Wharton, I. § 30—Wheaton, §§ 192–205—Bluntschli, §§ 314, 315—Hartmann, § 58—Heffter, § 77—Caratheodory in Holtzendorff, II. p. 279–406—Gareis, § 20—Liszt, §§ 9 and 27—Ullmann, §§ 76 and 94—Bonfils, Nos. 520–531—Despagnet, Nos. 461–467—Pradier-Fodéré, II. Nos. 688–755—Nys, I. pp. 438–441—Rivier, I. p. 142 and § 14—Calvo, I. §§ 302–340—Fiore, II. Nos. 755–776—Martens, I. § 102, II. § 57—Delavaud, "Navigation . . . sur les fleuves internationaux" (1885)—Engehardt, "Du régime conventionnel des fleuves internationaux" (1879), and "Histoire du droit fluvial conventionnel" (1889)—Vernesco, "Des fleuves en droit international" (1888)—Orban, "Étude sur le droit fluvial international" (1896).—Bergès, "Du régime de navigation des fleuves internationaux" (1902).

Rivers State property of Riparian States.

§ 176. Theory and practice agree upon the rule that rivers are part of the territory of the riparian State. Consequently, if a river lies wholly, that is, from its sources to its mouth, within the boundaries of one and the same State, such State owns it exclusively. As such rivers are under the sway of one State only and exclusively, they are named "national rivers." Thus, all rivers of Great Britain are national, and so are, to give some Continental examples, the Seine, Loire, and Garonne, which are French; the Tiber, which is Italian; the Volga, which is Russian. But many rivers do not run through the land of one and the same State only, whether they are so-called "boundary rivers," that is, rivers which separate two different States from each other, or whether they run through several States and are therefore named "not-national rivers." Such rivers are not owned by one State alone. Boundary rivers belong to the

territory of the States they separate, the boundary line[1] running either through the middle of the river or through the middle of the so-called mid-channel of the river. And rivers which run through several States belong to the territories of the States concerned; each State owns that part of the river which runs through its territory.

There is, however, another group of rivers to be mentioned, which comprises all such rivers as are navigable from the Open Sea and at the same time either separate or pass through several States between their sources and their mouths. Such rivers, too, belong to the territory of the different States concerned, but they are nevertheless named "international rivers," because freedom of navigation in time of peace on all of those rivers in Europe and on many of them outside Europe for merchantmen of all nations is recognised by International Law.

Navigation on National, Boundary, and not-National Rivers.

§ 177. There is no rule of the Law of Nations in existence which grants foreign States the right of admittance of their public or private vessels to navigation on national rivers. In the absence of commercial or other treaties granting such a right, every State can exclude foreign vessels from its national rivers or admit them under certain conditions only, such as the payment of a due and the like. The teaching of Grotius (II. c. 2, § 12) that innocent passage through rivers must be granted has not been recognised by the practice of the States, and Bluntschli's assertion (§ 314) that such rivers as are navigable from the Open Sea must in time of peace be open to vessels of all nations, is at best an anticipation of a future rule of International Law which does not as yet exist.

As regards boundary rivers and rivers running

[1] See below, § 199.

through several States, the riparian States can regulate navigation on such parts of these rivers as they own, and they can certainly exclude vessels of non-riparian States altogether unless prevented therefrom by virtue of special treaties.

Navigation on International Rivers.

§ 178. Whereas there is certainly no recognised principle of free navigation on national, boundary, and not-national rivers, a movement for the recognition of free navigation on international rivers set in at the beginning of the nineteenth century. Until the French Revolution towards the end of the eighteenth century, the riparian States of such rivers as are now called international rivers could, in the absence of special treaties, exclude foreign vessels altogether from those parts of the rivers which run through their territory, or admit them under discretionary conditions. Thus, the river Scheldt was wholly shut up in favour of the Netherlands according to article 14 of the Peace Treaty of Munster of 1648 between the Netherlands and Spain. The development of things in the contrary direction begins with a Decree of the French Convention, dated November 16, 1792, which opens the rivers Scheldt and Meuse to the vessels of all riparian States. But it was not until the Vienna Congress [1] in 1815 that the principle of free navigation on the international rivers of Europe by merchantmen of not only the riparian but of all States was proclaimed. The Congress itself realised theoretically that principle in making arrangements [2] for free navigation on the rivers Scheldt, Meuse, Rhine, and on the navigable tributaries of the latter—namely, the rivers Neckar,

[1] Articles 108–117 of the Final Act of the Vienna Congress. (See Martens, N.R., II. p. 427.)

[2] "Règlements pour la libre navigation des rivières." See Martens, N.R. II. p. 434.

Maine, and Moselle—although more than fifty years elapsed before the principle became realised in practice.

The next step was taken by the Peace Treaty of Paris of 1856, which by its article 15 [1] stipulated free navigation on the Danube and expressly declared the principle of the Vienna Congress regarding free navigation on international rivers for merchantmen of all nations as a part of "European Public Law." A special international organ for the regulation of navigation on the Danube was created, the so-called European Danube Commission.

A further development took place at the Congo Conference at Berlin in 1884–85, since the General Act [2] of this Conference stipulated free navigation on the rivers Congo and Niger and their tributaries, and created the so-called "International Congo Commission" as a special international organ for the regulation of the navigation of the said rivers.

Side by side with these general treaties, which recognise free navigation on international rivers, stand treaties [3] of several South American States with other States concerning free navigation for merchantmen of all nations on a number of South American rivers. And the Arbitration Court in the case of the boundary dispute between Great Britain and Venezuela decided in 1903 in favour of free navigation for merchantmen of all nations on the rivers Amakourou and Barima.

Thus the principle of free navigation which is a settled fact as regards all European and some African

[1] See Martens, N.R.G. XV. p. 776. The documents concerning navigation on the Danube are collected by Sturdza, Recueil de documents relatifs à la liberté de navigation du Danube, Berlin, 1904.

[2] See Martens, N.R.G., 2nd ser. X. p. 417.

[3] See Taylor, § 238.

international rivers, becomes more and more extended over all other international rivers of the world. But when several writers maintain that free navigation on all international rivers of the world is already a recognised rule of the Law of Nations, they are decidedly wrong, although such a universal rule will certainly be proclaimed in the future. There can be no doubt that as regards the South American rivers the principle is recognised by treaties between a small number of Powers only. And there are examples which show that the principle is not yet universally recognised. Thus by article 4 of the Treaty of Washington of 1854 between Great Britain and the United States the former grants to vessels of the latter free navigation on the river St. Lawrence as a revocable privilege, and article 26 of the Treaty of Washington of 1871 stipulates for vessels of the United States, but not for vessels of other nations, free navigation "for ever" on the same river.[1]

I should mention that the Institute of International Law at its meeting at Heidelberg in 1888 adopted a *Projet de Règlement international de navigation fluviale*,[2] which comprises forty articles.

[1] See Wharton, pp. 81–83, and Hall, § 39.

[2] See Annuaire, IX. p. 182.

IV

Lakes and Land-locked Seas.

Vattel, I. § 294—Hall, § 38—Phillimore, I. §§ 205-205A—Twiss, I. § 181—Halleck, I. p. 170—Bluntschli, § 316—Hartmann, § 58—Heffter, § 77—Caratheodory in Holtzendorff, II. pp. 378-385—Gareis, §§ 20-21—Liszt, § 9—Ullmann, §§ 77 and 94—Bonfils Nos. 495-505—Despagnet, No. 416—Pradier-Fodéré, II. Nos. 640-649—Nys, I. pp. 447-450—Calvo, I. §§ 301, 373, 383—Fiore, II. Nos. 811-813—Martens, I. § 100—Rivier, I. pp. 143-145, 230—Mischeff, "La Mer Noire et les détroits de Constantinople" (1901).

Lakes and land-locked seas State Property of Riparian States.

§ 179. Theory and practice agree upon the rule that such lakes and land-locked seas as are entirely enclosed by the land of one and the same State are part of the territory of this State. Thus the Dead Sea in Palestine is Turkish, the Sea of Aral is Russian, the Lake of Como is Italian territory. As regards, however, such lakes and land-locked seas as are surrounded by the territories of several States, no unanimity exists. The majority of writers consider these lakes and land-locked seas parts of the surrounding territories, but several[1] dissent, asserting that these lakes and seas do not belong to the riparian States, but are free like the Open Sea. The practice of the States seems to favour the opinion of the majority of writers, for special treaties frequently arrange what portions of such lakes and seas belong to the riparian States. Examples are :— The Lake of Constance, which is surrounded by the territories of Germany (Baden, Würtemberg, Bavaria), Austria, and Switzerland (Thurgau and St. Gall); the Lake of Geneva, which belongs to Switzerland and France; the Lakes of Huron, Erie, and Ontario, which belong to British Canada and the United

[1] See, for instance, Calvo, I. § 301; Caratheodory in Holtzendorff, II. p. 378.

States; the Caspian Sea, which belongs to Persia and Russia.[1]

So-called International Lakes and Land-locked Seas.

§ 180. In analogy with so-called international rivers, such lakes and land-locked seas as are surrounded by the territories of several States and are at the same time navigable from the Open Sea, are called "international lakes and land-locked seas." However, although some writers[2] dissent, it must be emphasised that hitherto the Law of Nations has not yet recognised the principle of free navigation on such lakes and seas. The only case in which such free navigation is stipulated is that of the lakes within the Congo district.[3] But there is no doubt that in a near future this principle will be recognised, and practically all so-called international lakes and land-locked seas are actually open to merchantmen of all nations. Good examples of such international lakes and land-locked seas are the fore-named lakes of Huron, Erie, and Ontario.

The Black Sea.

§ 181. It is of interest to give some details regarding the Black Sea. This is a land-locked sea which was undoubtedly wholly a part of Turkish territory as long as the enclosing land was Turkish only, and as long as the Bosphorus and the Dardanelles, the approach to the Black Sea, which are exclusively part of Turkish territory, were not open for merchantmen of all nations. But matters have changed through Russia, Roumania, and Bulgaria having become riparian States. It would be wrong to maintain that now the Black Sea belongs to the territories

[1] But the Caspian Sea is almost entirely under Russian control through the two treaties of Gulistan (1813) and Tourkmantschai (1828). (See Rivier, I. p. 144, and Phillimore, I. § 205.)

[2] See, for instance, Rivier, I. p. 230; Caratheodory in Holtzendorff, II. p. 378; Calvo, I. § 301.

[3] Article 15 of the General Act of the Congo Conference. (See Martens, N.R.G., 2nd ser. X. p. 417.)

of the four States, for the Bosphorus and the Dardanelles, although belonging to Turkish territory, are nevertheless parts of the Mediterranean Sea, and are now open to merchantmen of all nations. The Black Sea is consequently now part of the Open Sea[1] and is not the property of any State. Article 11 of the Peace Treaty of Paris,[2] 1856, neutralised the Black Sea, declared it open to merchantmen of all nations, but interdicted it to men-of-war of the riparian as well as of other States, admitting only a few Turkish and Russian public vessels for the service of their coasts. But although the neutralisation was stipulated "formally and in perpetuity," it lasted only till 1870. In that year, during the Franco-German war, Russia shook off the restrictions of the Treaty of Paris, and the Powers assembled at the Conference of London signed on March 13, 1871, the Treaty of London,[3] by which the neutralisation of the Black Sea and the exclusion of men-of-war therefrom were abolished. But the right of the Porte to forbid foreign men-of-war passage through the Dardanelles and the Bosphorus[4] was upheld by that treaty, as was also free navigation for merchantmen of all nations on the Black Sea.

[1] See below, § 252.

[2] See Martens, N.R.G. XV. p. 775.

[3] See Martens, N.R.G. XVIII. p. 303.

[4] See below, § 197.

V

Canals

Westlake, I. pp. 320–331—Lawrence, § 110, and Essays, pp. 41–162—Phillimore, I. §§ 399 and 207—Caratheodory in Holtzendorff, II. pp. 386–405—Liszt, § 27—Ullmann, § 95—Bonfils, Nos. 511–515—Pradier-Fodéré, II. Nos. 658–660—Nys, I. pp. 475–495—Rivier, I. § 16—Calvo, I. §§ 376–380—Martens, II. § 59—Sir Travers Twiss in R.I. VII. (1875), p. 682, XIV. (1882) p. 572, XVII. (1885), p. 615—Holland, Studies, pp. 270–298—Asser in R.I. XX. (1888), p. 529—Bustamante in R.I. XXVII. (1895), p. 112—Rossignol, "Le Canal de Suez" (1898)—Camand, "Etude sur le régime juridique du Canal de Suez" (1899)—Charles-Roux, "L'isthme et le canal de Suez" (1901).

Canals State Property of Riparian States.

§ 182. That canals are parts of the territories of the respective territorial States is obvious from the fact that they are artificially constructed waterways. And there ought to be no doubt[1] that all the rules regarding rivers must analogously be applied to canals. The matter needs no special mention at all were it not for the interoceanic canals which have been constructed during the second half of the nineteenth century or are contemplated in the future. And as regards one of these, the Emperor William Canal, which connects the Baltic with the North Sea, there is nothing to be said but that it is a canal made mainly for strategic purposes by the German Empire entirely through German territory. Although Germany keeps it open for navigation to vessels of all other nations, she exclusively controls the navigation thereof, and can at any moment exclude foreign vessels at discretion, or admit them upon any conditions she likes, apart from special treaty arrangements to the contrary.

[1] See, however, Holland, Studies, p. 278.

The Suez Canal.

§ 183. The only other interoceanic canal in existence is that of Suez, which connects the Red Sea with the Mediterranean. Already in 1838 Prince Metternich gave his opinion that such a canal, if ever made, ought to become neutralised by an international treaty of the Powers. When, in 1869, the Suez Canal was opened, jurists and diplomatists at once discussed what means could be found to secure free navigation upon it for vessels of all kinds and all nations in time of peace as well as of war. In 1875 Sir Travers Twiss[1] proposed the neutralisation of the canal, and in 1879 the Institute of International Law gave its vote[2] in favour of the protection of free navigation on the canal by an international treaty. In 1883 Great Britain proposed an international conference to the Powers for the purpose of neutralising the canal, but it took several years until an agreement was actualised. This was done by the Convention of Constantinople[3] of October 29, 1888, between Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia, and

[1] See R.I. VII. pp. 682–694.

[2] See Annuaire, III. and IV. vol. I. p. 349.

[3] See Martens, N.R.G., 2nd ser. XV. p. 557. It must, however, be mentioned that Great Britain is a party to the Convention of Constantinople under the reservation that its terms shall not be brought into operation in so far as they would not be compatible with the transitory and exceptional condition in which Egypt is put for the time being in consequence of her occupation by British forces, and in so far as they might fetter the liberty of action of the British Government during the occupation of Egypt. But article 6 of the Declaration respecting Egypt and Morocco signed at London on April 8, 1904, by Great Britain and France (see Parliamentary Papers, France, No. 1 (1904), p. 9), has done away with this reservation, since it stipulates the following:—"In order to ensure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of article 8 of that treaty will remain in abeyance." (See Holland, Studies, p. 293, and Westlake, I. p. 328.)

Turkey. This treaty comprises seventeen articles, whose more important stipulations are the following:—

(1) The canal is open in time of peace as well as of war to merchantmen and men-of-war of all nations. No attempt to restrict this free usage of the canal is allowed in time either of peace or of war. The canal can never be blockaded (article 1).

(2) In time of war, even if Turkey is a belligerent, no act of hostility is allowed either inside the canal itself or within three sea miles from its ports. Men-of-war of the belligerents have to pass through the canal without delay. They may not stay longer than twenty-four hours, a case of absolute necessity excepted, within the harbours of Port Said and Suez, and twenty-four hours must intervene between the departure from those harbours of a belligerent man-of-war and a vessel of the enemy. Troops, munitions, and other war material may neither be shipped nor unshipped within the canal and its harbours. All rules regarding belligerents men-of-war are likewise valid for their prizes (articles 4, 5, 6).

(3) No men-of-war are allowed to be stationed inside the canal, but each Power may station two men-of-war in the harbours of Port Said and Suez. Belligerents, however, are not allowed to station men-of-war in these harbours (article 7). No permanent fortifications are allowed in the canal (article 2).

(4) It is the task of Egypt to secure the carrying out of the stipulated rules, but the consuls of the Powers in Egypt are charged to watch the execution of these rules (articles 8 and 9).

(5) The signatory Powers are obliged to notify the treaty to others and to invite them to accede thereto (article 16).

The Panama Canal.

§ 184. Already in 1850 Great Britain and the United States in the Clayton-Bulwer Treaty[1] of Washington had stipulated free navigation and neutralisation of a canal between the Pacific and the Atlantic Ocean proposed to be constructed by the way of the river St. Juan de Nicaragua and either or both of the lakes of Nicaragua and Managua. In 1881 the building of a canal through the Isthmus of Panama was taken in hand, but in 1888 the works were stopped in consequence of the financial collapse of the Company undertaking its construction. After this the United States came back to the old project of a canal by the way of the river St. Juan de Nicaragua. For the eventuality of the completion of this canal, Great Britain and the United States signed, on February 5, 1900, the Convention of Washington, which stipulated free navigation on and neutralisation of the proposed canal in analogy with the Convention of Constantinople, 1888, regarding the Suez Canal, but ratification was refused by the Senate of the United States. In the following year, however, on November 18, 1901, another treaty was signed and afterwards ratified. This so-called Hay-Pauncefote Treaty applies to a canal between the Atlantic and Pacific Oceans by whatever route may be considered expedient, and its five articles are the following:—

Article 1

The High Contracting Parties agree that the present Treaty shall supersede the aforementioned Convention of April 19, 1850.

[1] See Martens, N.R.G. XV. p. 187. According to its article 8 this treaty was also to be applied to a proposed canal through the Isthmus of Panama.

Article 2

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

Article 3

The United States adopts, as the basis of the neutralisation of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed October 29, 1888, for the free navigation of the Suez Canal, that is to say:—

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised or any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible despatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

Article 4

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralisation or the obligation of the high contracting parties under the present Treaty.

Article 5

The present Treaty shall be ratified by his Britannic Majesty and by the President of the United States, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

In faith whereof the respective Plenipotentiaries have signed this Treaty and thereunto affixed their seals.

Done in duplicate at Washington, the 18th day of November, in the year of Our Lord 1901.

(Seal) PAUNCEFOTE.
(Seal) JOHN HAY.

On November 18, 1903, a treaty was concluded between the United States and the new Republic of Panama according to which Panama ceded to the United States the land required for the construction of a canal between Colon and Panama, and, further, the land on both sides of the canal to the extent of five miles on either side.[1]

VI

MARITIME BELT

Grotius, II. c. 3 § 13—Vattel, I. §§ 287-290—Hall, §§ 41-42—Westlake, I. pp. 183-192—Lawrence, § 107—Phillimore, I. §§ 197-201—Twiss, I. §§ 144, 190-192—Halleck, I. pp. 157-167—Taylor, §§ 247-250—Walker, § 17—Wharton, § 32—Wheaton, §§ 177-180—Bluntschli, §§ 302, 309-310—Hartmann, § 58—Heffter, § 75—Stoerk in Holtzendorff, II. pp. 409-449—Gareis, § 21—Liszt, § 9—Ullmann, § 76—Bonfils, Nos. 491-494—Despagnet, Nos. 417-423—Pradier-Fodéré, II. Nos. 617-639—Nys, I. pp. 496-520—Rivier, I. pp. 145-153—Calvo, I. §§ 353-362—Fiore, II. Nos. 801-809—Martens, I. § 99—Bynkershoek, "De dominio maris" and "Quaestiones juris publici," I. c. 8—Ortolan, "Diplomatie de la mer" (1856), I. pp. 150-175—Heilborn, System, pp. 37-57—Imbart-Latour, "La mer territoriale, etc." (1889)—Godey, "La mer côtière" (1896)—Schücking, "Das Küstenmeer im internationalen Recht" (1897)—Perels, § 5.

State Property of Maritime Belt contested.

§ 185. Maritime belt is that part of the sea which, in contradistinction to the Open Sea, is under the sway of the riparian States. But no unanimity exists with regard to the nature of the sway of the riparian States. Many writers maintain that such sway is sovereignty, that the maritime belt is a part

[1] See Martens, N. R. G. 2nd ser. xxxi. p. 599.

of the territory of the riparian State, and that the territorial supremacy of the latter extends over its coast waters. Whereas it is nowadays universally recognised that the Open Sea cannot be State property, such part of the sea as makes the coast waters would, according to the opinion of these writers, actually be the State property of the riparian States, although foreign States have a right of innocent passage of their merchantmen through the coast waters.

On the other hand, many writers of great authority emphatically deny the territorial character of the maritime belt and concede to the riparian States, in the interest of the safety of the coast, only certain powers of control, jurisdiction, police, and the like, but not sovereignty.

This is surely erroneous, since the real facts of international life would seem to agree with the first-mentioned opinion only. Its supporters rightly maintain [1] that the universally recognised fact of the exclusive right of the riparian State to appropriate the natural products of the sea in the coast waters, especially the use of the fishery therein, can coincide only with the territorial character of the maritime belt. The argument of their opponents that, if the belt is to be considered a part of State territory, every riparian State must have the right to sell and exchange its coast waters, can properly be met by the statement that territorial waters of all kinds are inalienable appurtenances [2] of the riparian States.

§ 186. Be that as it may, the question arises how

[1] Hall, p. 158. The question is treated with great clearness by Heilborn, System, pp. 37–57, and Schücking, pp. 14–20.

[2] See above, § 175. Bynkershoek's (De Dominio Maris, c. 5) opinion that a riparian State can alienate its maritime belt without the coast itself, is at the present day untenable.

far into the sea those waters extend which are coast waters and are therefore under the sway of the riparian State. Here, too, no unanimity exists upon either the starting line of the belt on the coast or the breadth itself of the belt from such starting line.

Breadth of Maritime Belt.

(1) Whereas the starting line is sometimes drawn along high-water mark, many writers draw it along low-water mark. Others draw it along the depths where the waters cease to be navigable; others again along those depths where coast batteries can still be erected, and so on.[1] But the number of those who draw it along low-water mark is increasing. The Institute of International Law[2] has voted in favour of this starting line, and many treaties stipulate the same.

(2) With regard to the breadth of the maritime belt various opinions have in former times been held, and very exorbitant claims have been advanced by different States. And although Bynkershoek's rule that *terrae potestas finitur ubi finitur armorum vis* is now generally recognised by theory and practice, and consequently a belt of such breadth is considered under the sway of the riparian State as is within effective range of the shore batteries, there is still no unanimity on account of the fact that such range is day by day increasing. Since at the end of the eighteenth century the range of artillery was about three miles, or one marine league, that distance became generally recognised as the breadth of the maritime belt. But no sooner was a common doctrine originated than the range of projectiles increased with the manufacture of heavier guns. And although many States in Municipal Laws and International

[1] See Schücking, p. 13.

[2] See Annuaire, XIII. p. 329.

Treaties still adhere to a breadth of one marine league, the time will come when by a common agreement of the States such breadth will be very much extended.[1] As regards Great Britain, the Territorial Waters Jurisdiction Act[2] of 1878 (41 and 42 Vict. c. 73) specially recognises the extent of the territorial maritime belt as three miles, or one marine league, measured from the low-water mark of the coast.

Fisheries, Cabotage, Police, and Maritime Ceremonials within the Belt.

§ 187. Theory and practice agree that the riparian State can exclusively reserve the fishery within the maritime belt[3] for its own subjects, whether fish or pearls or amber or other products of the sea are in consideration.

It is likewise agreed that the riparian State can, in the absence of special treaties to the contrary, exclude foreign vessels from navigation and trade along the coast, the so-called cabotage, and reserve this cabotage exclusively for its own vessels.

Again, it is agreed that the riparian State exclusively exercises police and control within its maritime belt in the interest of its custom-house duties, the secrecy of its coast fortifications, and the like. Thus foreign vessels can be ordered to take certain routes and to avoid others.

And it is, lastly, agreed that the riparian State can make laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen as enter its territorial maritime belt.[4]

§ 188. Although the maritime belt is a portion of

[1] The Institute of International Law has voted in favour of six miles, or two marine leagues, as the breadth of the belt. See Annuaire, XIII. p. 328.

[2] See above, § 25, and Maine, p. 39.

[3] All treaties stipulate for the purpose of fishery a three miles wide territorial maritime belt. See, for instance, article 1 of the Hague Convention concerning police and fishery in the North Sea of May 6, 1882. (Martens, N.R.G., 2nd ser. IX. p. 556.)

[4] See Twiss, I. § 194.

the territory of the riparian State and therefore under the absolute territorial supremacy of such State, the belt is nevertheless, according to the practice of all the States, open to merchantmen of all nations for inoffensive navigation, cabotage excepted. And it is the common conviction[1] that every State has by customary International Law the *right* to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State. Such right is correctly said to be a consequence of the freedom of the Open Sea, for without this right navigation on the Open Sea by vessels of all nations would in fact be an impossibility. And it is a consequence of this right that no State can levy tolls for the mere passage of foreign vessels through its maritime belt. Although the riparian State may spend a considerable amount of money for the erection and maintenance of light-houses and other facilities for safe navigation within its maritime belt, it cannot make merely passing foreign vessels pay for such outlays. It is only when foreign ships cast anchor within the belt or enter a port that they can be made to pay dues and tolls by the riparian State. Some writers[2] maintain that all nations have the right of inoffensive passage for their merchantmen by usage only, and not by the customary Law of Nations, and that, consequently, in strict law a riparian State can prevent such passage. They are certainly mistaken. An attempt on the part of a riparian State to prevent free navigation through the maritime belt in time of peace would meet with stern opposition on the part of all other States.

Navigation within the Belt.

But a right of foreign States for their men-of-war to pass unhindered through the maritime belt is

[1] See above, § 142. [2] Kluber, § 76; Pradier-Fodéré, II. No. 628.

not generally recognised. Although many writers assert the existence of such a right, many others emphatically deny it. As a rule, however, in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt. And it may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; and secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war.[1]

Jurisdiction within the Maritime Belt.

§ 189. That the riparian State has exclusive jurisdiction within the belt as regards mere matters of police and control is universally recognised. Thus it can exclude foreign pilots, can make custom-house arrangements, sanitary regulations, laws concerning stranded vessels and goods, and the like. It is further agreed that foreign merchantmen casting anchor within the belt or entering a port, fall at once and *ipso facto* under the jurisdiction of the riparian State. But it is a moot-point whether such foreign vessels as do not stay but merely pass through the belt are for the time being under this jurisdiction. It is for this reason that the British Territorial Waters Jurisdiction Act of 1878 (41 & 42 Vict. c. 73), which claims such jurisdiction, has called forth protests from many writers.[2] The controversy itself can be decided by the practice of the

[1] See below, § 449.

[2] See Perels, pp. 69–77. The Institute of International Law, which at its meeting at Paris in 1894 adopted a body of eleven rules regarding the maritime belt, gulfs, bays, and straits, voted against the jurisdiction of a riparian State over foreign vessels merely passing through the belt. (See Annuaire XIII. p. 328.)

States only. The British Act quoted, the basis of which is, in my opinion, sound and reasonable, is a powerful factor in initiating such a practice; but as yet no common practice of the States can be said to exist.

Zone for Revenue and Sanitary Laws.

§ 190. Different from the territorial maritime belt is the zone of the Open Sea, over which a riparian State extends the operation of its revenue and sanitary laws. The fact is that Great Britain and the United States, as well as other States, possess revenue and sanitary laws which impose certain duties not only on their own but also on such foreign vessels bound to one of their ports as are approaching, but not yet within, their territorial maritime belt.[1] Twiss and Phillimore agree that in strict law these Municipal Laws have no basis, since every State is by the Law of Nations prevented from extending its jurisdiction over the Open Sea, and that it is only the Comity of Nations which admits tacitly the operation of such Municipal Laws as long as foreign States do not object, and provided that no measure is taken within the territorial maritime belt of another nation. I doubt not that in time special arrangements will be made as regards this point through a universal international convention. But I believe that, since Municipal Laws of the above kind have been in existence for more than a hundred years and have not been opposed by other States, a customary rule of the Law of Nations may be said to exist which allows riparian States in the interest of their revenue and sanitary laws to impose certain

[1] See, for instance, the British so-called *Hovering Acts*, 9 Geo. II. c. 35 and 24 Geo. III. c. 47. The matter is treated by Taylor, § 248; Twiss, I. § 190; Phillimore, I. § 198; Halleck, I. p. 157; Stoerk in Holtzendorff, II. pp. 475–478; Perels, § 5 (pp. 25–28). See also Hall, Foreign Powers and Jurisdiction, §§ 108 and 109.

duties on such foreign vessels bound to their ports as are approaching, although not yet within, their territorial maritime belt.

VII

Gulfs and Bays

Vattel, § 291—Hall, § 41—Westlake, I. pp. 183-192—Lawrence, §§ 107-109—Phillimore, I. §§ 196-206—Twiss, I. §§ 181-182—Halleck, I. pp. 165-170—Taylor, §§ 229-231—Walker, § 18—Wharton, I. §§ 27-28—Wheaton, §§ 181-190—Bluntschli, §§ 309-310—Hartmann, § 58—Heffter, § 76—Stoerk in Holtzendorff, II. pp. 419-428—Gareis, § 21—Liszt, § 9—Ullmann, § 77—Bonfils, No. 516—Despagnet, Nos. 414-415—Pradier-Fodéré, II. Nos. 661-681—Nys, I. pp. 441-447—Rivier, I. pp. 153-157—Calvo, I. §§ 366-367—Fiore, II. Nos. 808-815—Martens, I. § 100—Perels, § 5—Schücking, "Das Küstenmeer im internationalen Recht" (1897), pp. 20-24.

Territorial Gulfs and Bays.

§ 191. It is generally admitted that such gulfs and bays as are enclosed by the land of one and the same riparian State, and whose entrance from the sea is narrow enough to be commanded by coast batteries erected on one or both sides of the entrance, belong to the territory of the riparian State even if the entrance is wider than two marine leagues, or six miles.

Some writers maintain that gulfs and bays whose entrance is wider than ten miles, or three and a third marine leagues, cannot belong to the territory of the riparian State, and the practice of some States accords with this opinion. But the practice of other countries, approved by many writers, goes beyond this limit. Thus Great Britain holds the Bay of Conception in Newfoundland to be territorial, although it

goes forty miles into the land and has an entrance fifteen miles wide. And the United States claim the Chesapeake and Delaware Bays, as well as other inlets of the same character, as territorial,[1] although many European writers oppose this claim. The Institute of International Law has voted in favour of a twelve miles wide entrance, but admits the territorial character of such gulfs and bays with a wider entrance as have been considered territorial for more than one hundred years.[2]

As the matter stands, it is doubtful as regards many gulfs and bays whether they are territorial or not. Examples of territorial bays in Europe are: The Zuider Zee is Dutch; the Frische Haff, the Kurische Haff, and the Bay of Stettin, in the Baltic, are German, as is also the Jade Bay in the North Sea. The whole matter calls for an international congress to settle the question once for all which gulfs and bays are to be considered territorial. And it must be specially observed that it is doubtful whether Great Britain would still, as she formerly did for centuries, claim the territorial character of the so-called King's Chambers,[3] which include portions of the sea between lines drawn from headland to headland.

Non-territorial Gulfs and Bays.

§ 192. Gulfs and bays surrounded by the land of one and the same riparian State whose entrance is so wide that it cannot be commanded by coast batteries, and, further, all gulfs and bays enclosed by the land of more than one riparian State, however

[1] See Taylor, § 229, and Wharton, I. §§ 27 and 28.

[2] See Annuaire, XIII. p. 329.

[3] Whereas Hall (§ 41, p. 162) says: "England would, no doubt, not attempt any longer to assert a right of property over the King's Chambers," Phillimore (I. § 200) still keeps up this claim; Lawrence (§ 107) is doubtful about the matter, and Westlake (I. p. 188) seems to consider this claim as abandoned. As regards the Narrow Seas, see below, § 194.

narrow their entrance may be, are non-territorial. They are parts of the Open Sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated, and they are in time of peace and war open to vessels of all nations including men-of-war.

Navigation and Fishery in Territorial Gulfs and Bays.

§ 193. As regards navigation and fishery within territorial gulfs and bays, the same rules of the Law of Nations are valid as those for navigation and fishery within the territorial maritime belt. The right of fishery may, therefore, exclusively be reserved for subjects of the riparian State.[1] And navigation, cabotage excepted, must be open to merchantmen of all nations, but foreign men-of-war need not be admitted.

[1] The Hague Convention concerning police and fishery in the North Sea, concluded on May 6, 1882, between Great Britain, Belgium, Denmark, France, Germany, and Holland, reserves in its article 2 the fishery within bays exclusively for subjects of the riparian States within a three miles wide maritime belt only, so that the fishery would be reserved within such bays only as have an entrance not wider than six miles. (See Martens, N.R.G. 2nd ser. IX. p. 556.)

VIII

STRAITS

Vattel, I. § 292—Hall, § 41—Westlake, I. pp. 193-197—Lawrence, §§ 107-109—Phillimore, I. §§ 180-196—Twiss, I. §§ 183, 184, 189—Halleck, I. pp. 165-170—Taylor, §§ 229-231—Walker, § 17—Wharton, §§ 27-29—Wheaton, §§ 181-190—Bluntschli, § 303—Hartmann, § 65—Heffter, § 76—Stoerk in Holtzendorff, II. pp. 419-428—Gareis, § 21—Liszt, §§ 9 and 26—Ullmann, § 77—Bonfils, Nos. 506-511—Despagnet, Nos. 424-427—Pradier-Fodéré, II. Nos. 650-656—Nys, I. pp. 451-474—Rivier, I. pp. 157-159—Calvo, I. §§ 368-372—Fiore, II. Nos. 745-754—Martens, I. § 101—Holland Studies, p. 277.

What Straits are Territorial.

§ 194. All straits which are so narrow as to be under the command of coast batteries erected either on one or both sides of the straits, are territorial. Therefore, straits of this kind which divide the land of one and the same State belong to the territory of such State. Thus the Solent, which divides the Isle of Wight from England, is British, the Dardanelles and the Bosphorus are Turkish. On the other hand, if such narrow strait divides the land of two different States, it belongs to the territory of both, the boundary line running, failing a special treaty making another arrangement, through the mid-channel.[1] Thus the Lymoon Pass, the narrow strait which separates the British island of Hong Kong from the continent, was half British and half Chinese as long as the land opposite Hong Kong was Chinese territory. It would seem that claims of States over wider straits than those which can be commanded by guns from coast batteries are no longer upheld. Thus Great Britain used formerly to claim the Narrow Seas—namely, the St. George's

[1] See below, § 199.

Channel, the Bristol Channel, the Irish Sea, and the North Channel—as territorial; and Phillimore asserts that the exclusive right of Great Britain over these Narrow Seas is uncontested. But in spite of this assertion it must be emphasised that this right *is* contested, and I believe that Great Britain would now no longer uphold her former claim.[1] At least the Territorial Waters Jurisdiction Act 1878 does not mention it.

Navigation, Fishery, and Jurisdiction in Straits.

§ 195. All rules of the Law of Nations concerning navigation, fishery, and jurisdiction within the maritime belt apply likewise to navigation, fishery, and jurisdiction within straits. Foreign merchantmen, therefore, cannot be excluded; foreign men-of-war must be admitted to such straits as form part of the highways for international traffic;[2] the right of fishery may exclusively be reserved for subjects of the riparian State; and the latter can exercise jurisdiction over all foreign merchantmen passing through the straits. If the narrow strait divides the land of two different States, jurisdiction and fishery are reserved for each riparian State within the boundary line running through the mid-channel or otherwise as by treaty arranged.

The former Sound Dues.

§ 196. The rule that foreign merchantmen must be allowed inoffensive passage through territorial straits without any dues and tolls whatever, had one

[1] See Phillimore, I. § 189, and above, § 191 (King's Chambers). Concerning the Bristol Channel, Hall (§ 41, p. 162, note 2) remarks: "It was apparently decided by the Queen's Bench in Reg. *v.* Cunningham (Bell's Crown Cases, 86) that the whole of the Bristol Channel between Somerset and Glamorgan is British territory; possibly, however, the Court intended to refer only to that portion of the Channel which lies within Steepholm and Flatholm." (See also Westlake, I. p. 188, note 3.)

[2] As, for instance, the Straits of Magellan. These straits were neutralised in 1881—see below, § 568, and vol. II. § 72—by a treaty between Chili and Argentine. See Abribat, Le détroit de Magellan au point de vue international (1902), and Nys, I. pp. 470–474.

exception until the year 1857. From time immemorial, Denmark had not allowed foreign vessels the passage through the two Belts and the Sound, a narrow strait which divides Denmark from Sweden and connects the Kattegat with the Baltic, without payment of a toll, the so-called Sound Dues.[1] Whereas in former centuries these dues were not opposed, they were not considered any longer admissible as soon as the principle of free navigation on the sea became generally recognised, but Denmark nevertheless insisted upon the dues. In 1857, however, an arrangement[2] was completed between the maritime Powers of Europe and Denmark by which the Sound Dues were abolished against a heavy indemnity paid by the signatory States to Denmark. And in the same year the United States entered into a convention[3] with Denmark for the free passage of their vessels, and likewise paid an indemnity. With these dues has disappeared the last witness of former times when free navigation on the sea was not universally recognised.

The Bosphorus and Dardanelles.

§ 197. The Bosphorus and Dardanelles, the two Turkish territorial straits which connect the Black Sea with the Mediterranean, must be specially mentioned.[4] So long as the Black Sea was entirely enclosed by Turkish territory and was therefore a portion of this territory, Turkey could exclude foreign vessels from the Bosphorus and the Dardanelles altogether, unless prevented by special treaties. But when in the eighteenth century Russia became a

[1] See the details, which have historical interest only, in Twiss, I. § 188; Phillimore, I. § 189; Wharton, I. § 29; and Scherer, Der Sundzoll (1845).

[2] The Treaty of Copenhagen of March 14, 1857. (See Martens, N.R.G. XVI. 2nd part, p. 345.)

[3] Convention of Washington of April 11, 1857. (See Martens, N.R.G. XVII. 1st part, p. 210.)

[4] See Holland, The European Concert in the Eastern Question, p. 225, and Perels, p. 29.

riparian State of the Black Sea and the latter, therefore, ceased to be entirely a territorial sea, Turkey, by several treaties with foreign Powers, conceded free navigation through the Bosphorus and the Dardanelles to foreign merchantmen. But she always upheld the rule that foreign men-of-war should be excluded from these straits. And by article 1 of the Convention of London of July 10, 1841, between Turkey, Great Britain, Austria, France, Prussia, and Russia, this rule was once for all accepted. Article 10 of the Peace Treaty of Paris of 1856 and the Convention No. 1 annexed to this treaty, and, further, article 2 of the Treaty of London, 1871, again confirm the rule, and all those Powers which were not parties to these treaties submit nevertheless to it.[1] According to the Treaty of London of 1871, however, the Porte can open the straits in time of peace to the men-of-war of friendly and allied Powers for the purpose, if necessary, of securing the execution of the stipulations of the Peace Treaty of Paris of 1856.

On the whole, the rule has in practice always been upheld by Turkey. Foreign light public vessels in the service of foreign diplomatic envoys at Constantinople can be admitted by the provisions of the Peace Treaty of Paris of 1856. And on several occasions when Turkey has admitted a foreign man-of-war carrying a foreign monarch on a visit to Constantinople, there has been no opposition by the Powers.[2] But when in 1902 Turkey allowed four Russian torpedo destroyers to pass through the Black Sea on the condition that these vessels should be disarmed and sail under the Russian commercial flag,

[1] The United States, although she actually acquiesces in the exclusion of her men-of-war, seems not to consider herself bound by the Convention of London, to which she is not a party. (See Wharton, I. § 29.)

[2] See Perels, p. 30.

Great Britain protested and declared that she reserved the right to demand similar privileges for her men-of-war should occasion arise. As far as I know, however, no other Power has joined Great Britain in this protest.

IX

Boundaries of State Territory

Grotius, II. c. 3, § 18—Vattel, I. § 266—Hall, § 38—Westlake, I. pp. 141–142—Twiss, I. §§ 147–148—Taylor, § 251—Bluntschli, §§ 296–302—Hartmann, § 59—Heffter, § 66—Holtzendorff in Holtzendorff, II. pp. 232–239—Gareis, § 19—Liszt, § 9—Ullmann, § 80—Bonfils, Nos. 486–489—Despagnet, No. 387—Pradier-Fodéré, II. Nos. 759–777—Nys, I. pp. 413–422—Rivier, I. § 11—Calvo, I. §§ 343–352—Fiore, II. Nos. 799–806—Martens, I. § 89.

Natural and Artificial Boundaries.

§ 198. Boundaries of State territory are the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the Open Sea. The course of the boundary lines may or may not be indicated by boundary signs. These signs may be natural or artificial, and one speaks, therefore, of natural in contradistinction to artificial boundaries. *Natural* boundaries may consist of water, a range of rocks or mountains, deserts, forests, and the like. *Artificial* boundaries are such signs as have been purposely put up to indicate the way of the imaginary boundary-line. They may consist of posts, stones, bars, walls,[1] trenches, roads, canals, buoys in water, and the like. It must, however, be borne in mind that the distinction between artificial and

[1] The Romans of antiquity very often constructed boundary walls, and the Chinese Wall may also be cited as an example.

natural boundaries is not sharp, in so far as some natural boundaries can be artificially created. Thus a forest may be planted, and a desert may be created, as was the frequent practice of the Romans of antiquity for the purpose of marking the frontier.

Boundary Waters.

§ 199. Natural boundaries consisting of water must be specially discussed on account of the different kinds of boundary waters. Such kinds are rivers, lakes, land-locked seas, and the maritime belt.

(1) Boundary rivers are such rivers as separate two different States from each other.[1] If such river is not navigable, the imaginary boundary line runs down the middle of the river, following all turnings of the border line of both banks of the river. On the other hand, in a navigable river the boundary line runs through the middle of the so-called *Thalweg*, that is, the mid-channel of the river. It is, thirdly, possible that the boundary line is the *border line* of the river, so that the whole bed belongs to one of the riparian States only.[2] But this is an exception created by treaty or by the fact that a State has occupied the lands on one side of a river at a time prior to the occupation of the lands on the other side by some other State.[3] And it must be remembered that, since a river sometimes changes more or less its course, the boundary line running through the middle or the *Thalweg* or along the border-line is thereby also altered.[4]

[1] This case is not to be confounded with the other, in which a river runs through the lands of two different States. In this latter case the boundary line runs across the river.

[2] See above, § 175.

[3] See Twiss, I. §§ 147 and 148, and Westlake, I. p. 142.

[4] In case a bridge is built over a boundary river, the boundary line runs, failing special treaty arrangements, through the middle of the bridge. As regards the boundary lines running through islands rising in boundary rivers and through the abandoned beds of such rivers, see below, §§ 234 and 235.

(2) Boundary lakes and land-locked seas are such as separate the lands of two or more different States from each other. The boundary line runs through the middle of these lakes and seas, but as a rule special treaties portion off such lakes and seas between riparian States.[1]

(3) The boundary line of the maritime belt is, according to details given above (§ 186), uncertain, since no unanimity prevails with regard to the width of the belt. It is, however, certain that the boundary line runs not nearer to the shore than three miles, or one marine league, from the low-water mark.

(4) In a narrow strait separating the lands of two different States the boundary line runs either through the middle or through the mid-channel,[2] unless special treaties make different arrangements.

Boundary Mountains.

§ 200. Boundary mountains or hills are such natural elevations from the common level of the ground as separate the territories of two or more States from each other. Failing special treaty arrangements, the boundary line runs on the mountain ridge along with the watershed. But it is quite possible that boundary mountains belong wholly to one of the States which they separate.[3]

Boundary Disputes.

§ 201. Boundary lines are, for many reasons, of such vital importance that disputes relating thereto are inevitably very frequent and have often led to war. During the nineteenth century, however, a tendency began to prevail to settle such disputes peaceably. The simplest way in which this can be done is always by a boundary treaty, provided the parties can come to terms. In other cases arbitration can settle the matter, as, for instance, in the

[1] See above, § 179. and above, § 194.
[2] See Twiss, I. §§ 183 and 184, [3] See Fiore, II. No. 800.

Alaska Boundary dispute between Great Britain (representing Canada) and the United States, settled in 1903. Sometimes International Commissions are specially appointed to settle the boundary lines. In this way the boundary lines between Turkey, Bulgaria, Servia, Montenegro, and Roumania were settled after the Berlin Congress of 1878. It sometimes happens that the States concerned, instead of settling the boundary line, keep a strip of land between their territories under their joint tenure and administration, so that a so-called *condominium* comes into existence, as in the case of Moresnet (Kelmis) on the Prusso-Belgian frontier.[1]

Natural Boundaries *sensu politico.*

§ 202. Whereas the term "natural boundaries" in the theory and practice of the Law of Nations means natural signs which indicate the course of boundary lines, the same term is used politically[2] in various different meanings. Thus the French often speak of the river Rhine as their "natural" boundary, as the Italians do of the Alps. Thus, further, the zones within which the language of a nation is spoken are frequently termed that nation's "natural" boundary. Again, the line enclosing such parts of the land as afford great facilities for defence against an attack is often called the "natural" boundary of a State, whether or not these parts belong to the territory of the respective State. It is obvious that all these and other meanings of the term "natural boundaries" are of no importance whatever to the Law of Nations, whatever value they may have politically.

[1] See above, § 171, No. 1. [2] See Rivier, I. p. 166.

X

State Servitudes

Hall, § 42*—Westlake, I. p. 61—Phillimore, I. §§ 281–283—Twiss, I. § 245—Taylor, § 252—Bluntschli, §§ 353–359—Hartmann, § 62—Heffter, § 43—Holtzendorff in Holtzendorff, II. pp. 242–252—Gareis, § 71—Liszt, §§ 8 and 19—Ullmann, § 88—Bonfils, Nos. 340–344—Despagnet, Nos. 190–192—Pradier-Fodéré, II. Nos. 834–845, 1038—Rivier, I. pp. 296–303—Calvo, III. § 1583—Fiore, I. § 380—Martens, I. §§ 94–95—Clauss, "Die Lehre von den Staatsdienstbarkeiten" (1894)—Fabres, "Des servitudes dans le droit international" (1901).

Conception of State Servitudes.

§ 203. State servitudes are those exceptional and conventional restrictions on the territorial supremacy of a State by which a part or a whole of its territory is in a limited way made to perpetually serve a certain purpose or interest of another State. Thus a State may through a convention be obliged to allow the passage of troops of a neighbouring State, or may in the interest of a neighbouring State be prevented from fortifying a certain town near the frontier.

That State servitudes are or may on occasions be of great importance, there can be no doubt whatever. The vast majority [1] of writers and the practice of the States accept, therefore, the conception of State servitudes, although they do not agree with regard to the definition and the width of the conception, and although, consequently, in many cases the question is disputed whether a certain restriction upon territorial supremacy is or is not a State servitude.

Servitudes must not be confounded [2] with those

[1] The conception of State servitudes is rejected by Bulmerincq (§ 49), Gareis (§ 71), Liszt (§§ 8 and 19), Jellinek (Allgemeine Staatslehre, p. 366).

[2] This is, for instance, done by Heffter (§ 43), Martens (§ 94), and Hall (§ 42*); the latter speaks of the right of innocent use of territorial seas as a servitude.

general restrictions upon territorial supremacy which, according to certain rules of the Law of Nations, concern all States alike. These restrictions are named "natural" restrictions of territorial supremacy (*servitutes juris gentium naturales*), in contradistinction to the conventional restrictions (*servitutes juris gentium voluntariae*) which constitute the State servitudes in the technical sense of the term. Thus, for instance, it is not a State servitude, but a "natural" restriction on territorial supremacy, that a State is obliged to admit the free passage of foreign merchantmen through its territorial maritime belt.

Subjects of State Servitudes.

§ 204. Subjects of State servitudes are States only and exclusively, since State servitudes can exist between States only (*territorium dominans* and *territorium serviens*). Formerly some writers [1] maintained that private individuals and corporations were able to acquire a State servitude; but nowadays it is agreed that this is not possible, since the Law of Nations is a law between States only and exclusively. Whatever rights may be granted by a State to foreign individuals and corporations, such rights can never constitute State servitudes.

On the other hand, every State can acquire and grant State servitudes, although some States may, in consequence of their particular position within the Family of Nations, be prevented from acquiring or granting some special kind or another of State servitudes. Thus neutralised States are in many points hampered in regard to acquiring and granting State servitudes, because they have to avoid everything that could drag them indirectly into war. Thus, further, half-Sovereign and part-Sovereign

[1] Bluntschli, § 353; Heffter, § 43.

States may not be able to acquire and to grant certain State servitudes on account of their dependence upon their superior State. But apart from such exceptional cases, even not-full Sovereign States can acquire and grant State servitudes, provided they have any international status at all.

Object of State Servitudes.

§ 205. The object of State servitudes is always the whole or a part of the territory of the State whose territorial supremacy is restricted by any such servitude. Since the territory of a State includes not only the land but also the rivers which water the land, the maritime belt, the territorial subsoil, and the territorial atmosphere, all these can, as well as the service of the land itself, be an object of State servitudes. Thus a State may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another State, or a right to lay telegraph cables through a foreign maritime belt, or a right to build and use a tunnel through a boundary mountain, and the like. And should ever aërostation become so developed as to be of practical utility, a State servitude might be created through a State acquiring a perpetual right to send military aerial vehicles through the territorial atmosphere of a neighbouring State.[1]

Since the object of State servitudes is the territory of a State, all such restrictions upon the territorial supremacy of a State as do not make a part or the whole of its territory itself serve a purpose or an interest of another State are not State servitudes. The territory as the object is the mark of distinction between State servitudes and other restrictions on the territorial supremacy. Thus the perpetual restriction

[1] It need hardly be mentioned that the Open Sea can never be the object of a State servitude, since it is no State's territory.

imposed upon a State by a treaty not to keep an army beyond a certain size is certainly a restriction on territorial supremacy, but is not, as some writers[1] maintain, a State servitude, because it does not make the territory of one State serve an interest of another. On the other hand, when a State submits to a perpetual right enjoyed by another State of passage of troops, or to the duty not to fortify a certain town on the frontier, or to the claim of another State for its subjects to be allowed the fishery within the former's territorial belt;[2] in all these and the like[3] cases the territorial supremacy of a State *is* in such a way restricted that a part or the whole of its territory is made to serve the interest of another State, and such restrictions are therefore State servitudes.[4]

Different kinds of State Servitudes.

§ 206. According to different qualities different kinds of State servitudes must be distinguished.

(1) Affirmative, active, or positive, are those servitudes which give the right to a State to perform

[1] Bluntschli, § 356.

[2] An example of such fishery servitude is the former French fishery rights in Newfoundland which were based on article 13 of the Treaty of Utrecht, 1713, and on the Treaty of Versailles, 1783. See the details regarding the Newfoundland Fishery Dispute, in Phillimore, I. § 195; Clauss, pp. 17–31; Geffcken in R.I. XXII. p. 217; Brodhurst in Law Magazine and Review, XXIV. p. 67. The French literature on the question is quoted in Bonfils, No. 342, note 1. The dispute is now settled through France's renunciation of the privileges due to her according to article 13 of the Treaty of Utrecht, which took place by article 1 of the Anglo-French Convention signed in London on April 8, 1904. But France retains, according to article 2 of the latter Convention, the right of fishing for her subjects in certain parts of the territorial waters of Newfoundland.

[3] Phillimore (I. § 283) quotes two interesting State servitudes which belong to the past. According to articles 4 and 10 of the Treaty of Utrecht, 1713, France was, in the interest of Great Britain, not to allow the Stuart Pretender to reside on French territory, and Great Britain was, in the interest of Spain, not to allow Moors and Jews to reside in Gibraltar.

[4] The controverted question whether neutralisation of a State creates a State servitude is answered by Clauss (p. 167) in the affirmative, but by Ullmann (§ 88), correctly, I think, in the negative. But a distinction must be drawn between neutralisation of a whole State and neutralisation of certain parts of a State. In the latter case a State servitude is indeed created.

certain acts on the territory of another State, such as to build and work a railway, to establish a custom-house, to let an armed force pass through a certain territory (*droit d'étape*), or to keep troops in a certain fortress, to use a port or an island as a coaling station, and the like.

(2) Negative, are such servitudes as give a right to a State to demand of another State that the latter shall abstain from exercising its territorial supremacy in certain ways. Thus a State can have a right to demand that a neighbouring State shall not fortify certain towns near the frontier, that another State shall not allow foreign men-of-war in a certain harbour.[1]

(3) Military, are those State servitudes which are acquired for military purposes, such as the right to keep troops in a foreign fortress, or to let an armed force pass through foreign territory, or to demand that a town on foreign territory shall not be fortified, and the like.

(4) Economic, are those servitudes which are acquired for the purpose of commercial interests, traffic, and intercourse in general, such as the right of fisheries in foreign territorial waters, to build a railway on or lay a telegraph cable through foreign territory, and the like.

Validity of State Servitudes.

§ 207. Since State servitudes, in contradistinction to personal rights (rights *in personam*), are rights inherent to the object with which they are connected (rights *in rem*), they remain valid and may be exercised however the ownership of the territory to which they apply may change. Therefore, if, after the creation of a State servitude, the part of the territory

[1] Affirmative State servitudes consist *in patiendo*, negative servitudes *in non faciendo*. The rule of Roman Law, *servitus in faciendo consistere nequit*, has been adopted by the Law of Nations.

affected comes by conquest or cession under the territorial supremacy of another State, such servitude remains in force. Thus, when the Alsatian town of Hüningen became in 1871, together with the whole of Alsace, German territory, the State servitude created by the Treaty of Paris, 1815, that Hüningen should, in the interest of the Swiss Canton of Basle, never be fortified, was not extinguished.[1] Thus, further, when in 1860 the former Sardinian provinces of Chablais and Faucigny became French, the State servitude created by article 92 of the Act of the Vienna Congress, 1815, that Switzerland should have temporarily during war the right to locate troops in these provinces was not extinguished.[2]

It is a very open question whether military State servitudes can be exercised in time of war by a belligerent if the State with whose territory they are connected remains neutral. Must such State, for the purpose of upholding its neutrality, prevent the belligerent from exercising the respective servitude—for instance, the right of passage of troops?[3]

Extinction of State Servitudes.

§ 208. State servitudes are extinguished by agreement between the States concerned, or by express or tacit[4] renunciation on the part of the State in whose interest they were created. They are not, according to the correct opinion, extinguished by reason of the territory involved coming under the territorial supremacy of another State. But it is difficult to understand why, although State servitudes are called into existence through treaties, it is

[1] Details in Clauss, pp. 15–17.

[2] Details in Clauss, pp. 8–15.

[3] This question became practical when in 1900, during the South African war, Great Britain claimed, and Portugal was ready to grant, passage of troops through Portuguese territory in South Africa. (See below, vol. II. § 323, and Clauss, pp. 212–217.)

[4] See Bluntschli, § 359 b. The opposition of Clauss (p. 219) and others to this sound statement of Bluntschli's is not justified.

sometimes maintained that the clause *rebus sic stantibus*[1] cannot be applied in case a vital change of circumstances makes the exercise of a State servitude unbearable. That in such case the restricted State must previously try to come to terms with the State which is the subject of the servitude, is a matter of course. But if an agreement cannot be arrived at on account of the unreasonableness of the other party, the clause *rebus sic stantibus* may well be resorted to.[2] The fact that the practice of the States does not provide any example of an appeal to this clause for the purpose of doing away with a State servitude proves only that such appeal has hitherto been unnecessary.

XI

Modes of acquiring State Territory

Vattel, I. §§ 203–207—Hall, § 31—Westlake, I. pp. 84–116—Lawrence, §§ 92–99—Phillimore, I. §§ 222–225—Twiss, I. §§ 113–139—Halleck, I. p. 154—Taylor, §§ 217–228—Wheaton, §§ 161–163—Bluntschli, §§ 278–295—Hartmann, § 61—Heffter, § 69—Holtzendorff in Holtzendorff, II. pp. 252–255—Gareis, § 76—Liszt, § 10—Ullmann, § 81—Bonfils, No. 532—Despagnet, No. 888—Pradier-Fodéré, II. Nos. 781–787—Rivier, I. § 12—Calvo, I. § 263—Fiore, I. Nos. 838–840—Martens, I. § 90—Heimburger, "Der Erwerb der Gebietshoheit" (1888).

Who can acquire State Territory?

§ 209. Since States only and exclusively are subjects of the Law of Nations, it is obvious that, as far as the Law of Nations is concerned, States[3] solely

[1] See below, § 539.

[2] See Bluntschli, § 359 d, and Pradier-Fodéré, II. No. 845. Clauss (p. 222) and others oppose this sound statement likewise.

[3] There is no doubt that no full-Sovereign State is, as a rule, prevented by the Law of Nations from acquiring more territory than it already owns, unless some treaty arrangement precludes it from so doing. It has been asserted (Fauchille, in R.G. II. p. 427) that a neutralised State is *ipso facto*

can acquire State territory. But the acquisition of territory by an existing State and member of the Family of Nations must not be confounded, first, with the foundation of a new State, and, secondly, with the acquisition of such territory and sovereignty over it by private individuals or corporations as lies outside the dominion of the Law of Nations.

(1) Whenever a multitude of individuals, living on or entering into such a part of the surface of the globe as does not belong to the territory of any member of the Family of Nations, constitute themselves as a State and nation on that part of the globe, a new State comes into existence. This State is not, by reason of its birth, a member of the Family of Nations. The formation of a new State is, as will be remembered from former statements,[1] a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new State becomes a member of the Family of Nations and a subject of International Law. As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory was acquired before the recognition.

(2) Not essentially different is the case in which a private individual or a corporation acquires land with sovereignty over it in countries which are not under the territorial supremacy of a member of the Family of Nations. The actual proceeding in all

by its neutralisation prevented from acquiring territory. But this is certainly wrong in its generality, although territory acquired by a neutralised State would not *ipso facto* have the character of neutralised territory, and although it is quite possible that the Powers would intervene and prevent such neutralised State from acquiring a certain piece of land because such acquisition might endanger the permanent neutrality of the said State. (See Rivier, I. p. 172.)

[1] See above, § 71.

such cases is that all such acquisition is made either by occupation of hitherto uninhabited land, for instance an island, or by cession from a native tribe living on the land. Acquisition of territory and sovereignty thereon in such cases takes place outside the dominion of the Law of Nations, and the rules of this law, therefore, cannot be applied. If the individual or corporation which has made the acquisition requires protection by the Law of Nations, they must either declare a new State to be in existence and ask for its recognition by the Powers, as in the case of the Congo Free State,[1] or they must ask a member of the Family of Nations to acknowledge the acquisition as made on its behalf.[2]

Former Doctrine concerning Acquisition of Territory.

§ 210. No unanimity exists among writers on the Law of Nations with regard to the modes of acquiring territory on the part of the members of the Family of Nations. The topic owes its controversial character to the fact that the conception of State territory has undergone a great change since the appearance of the science of the Law of Nations. When Grotius created that science, State territory used to be still, as in the Middle Ages, more or less identified with the private property of the monarch of the State. Grotius and his followers applied, therefore, the rules of Roman Law concerning the acquisition of private property to the acquisition of territory by States.[3] As nowadays, as far as

[1] See above, § 101. The case of Sir James Brooke, who acquired in 1841 Sarawak, in North Borneo, and established an independent State there, whose Sovereign he became, may also be cited. Sarawak is under English protectorate, but the successor of Sir James Brooke is still recognised as Sovereign.

[2] The matter is treated with great lucidity by Heimburger, pp. 44–77, who defends the opinion represented in the text against Sir Travers Twiss (I. Preface, p. x.; also in R.I. xv. p. 547, and xvi. p. 237) and other writers. See also Ullmann, § 82.

[3] See above, § 168. The distinction between *imperium* and

International Law is concerned, every analogy to private property has disappeared from the conception of State territory, the acquisition of territory by a State can mean nothing else than the acquisition of *sovereignty* over such territory. It is obvious that under these circumstances the rules of Roman Law concerning the acquisition of private property can no longer be applied. Yet the fact that they have been applied in the past has left traces which can hardly be obliterated; and they need not be obliterated, since they contain a good deal of truth in agreement with the actual facts. But the different modes of acquiring territory must be taken from the real practice of the States, and not from Roman Law, although the latter's terminology and common-sense basis may be made use of.

What Modes of Acquisition of Territory there are.

§ 211. States as living organisms grow and decrease in territory. If the historical facts are taken into consideration, different reasons may be found to account for the exercise of sovereignty by a State over the different sections of its territory. One section may have been ceded by another State, another section may have come into the possession of the owner in consequence of accretion, a third through subjugation, a fourth through occupation of no State's land. As regards a fifth section, a State may say that it has exercised its sovereignty over the same for so long a period that the fact of having had it in undisturbed possession is a sufficient title of ownership. Accordingly, five modes of acquiring territory may be distinguished, namely: cession, occupation, accretion, subjugation, and prescription.

dominium in Seneca's *dictum* that "omnia rex imperio possidet, singuli dominio" was well known, and Grotius, II. c. 3, § 4, quotes it, but the consequences thereof were nevertheless not deduced. (See Westlake, Chapters, pp. 129–133, and Westlake, I. pp. 84–88.)

Most writers recognise these five modes. Some, however, do not recognise prescription; some assert that accretion creates nothing else than a modification of the territory of a State; and some do not recognise subjugation at all, or declare it to be only a special case of occupation. It is for these reasons that some writers recognise only two or three[1] modes of acquiring territory. Be that as it may, all modes, besides the five mentioned, enumerated by some writers, are in fact not special modes, but only special cases of cession.[2]

Original and derivative Modes of Acquisition.

§ 212. The modes of acquiring territory are correctly divided according as the title they give is derived from the title of a prior owner State, or not. Cession is therefore a derivative mode of acquisition, whereas occupation, accretion, subjugation, and prescription are original modes.

[1] Thus, Ullmann (§ 81) and Gareis (§ 70) recognise cession and occupation only, whereas Heimburger (pp. 106–110) and Holtzendorff (II. p. 254) recognise cession, occupation, and accretion only.

[2] See below, § 216. Such alleged special modes are sale, exchange, gift, marriage contract, testamentary disposition, and the like.

XII

Cession

Hall, § 35—Lawrence, § 97—Phillimore, I. §§ 252-273—Twiss, I. § 138—Walker, § 10—Halleck, I. pp. 154-157—Taylor, § 227—Bluntschli, §§ 285-287—Hartmann, § 61—Heffter, §§ 69 and 182—Holtzendorff in Holtzendorff, II. pp. 269-274—Gareis, § 70—Liszt, § 10—Ullmann, §§ 86-87—Bonfils, Nos. 364-371—Despagnet, Nos. 391-400—Pradier-Fodéré, II. Nos. 817-819—Rivier, I. pp. 197-217—Calvo, I. § 266—Fiore, II. §§ 860-861—Martens, I. § 91—Heimburger, "Der Erwerb der Gebietshoheit" (1888) pp. 110-120.

Conception of cession of State Territory.

§ 213. Cession of State territory is the transfer of sovereignty over State territory by the owner State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules[1] for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law.[2] But if such municipal rules contain constitutional restrictions of the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by heads of States or Governments as violate these restrictions are not binding.[3]

Subjects of cession.

§ 214. Since cession is a bilateral transaction, it has two subjects—namely, the ceding and the acquiring State. Both subjects must be States, and only those cessions in which both subjects are States

[1] See above, § 168. [2] See above, § 21.
[3] See below, § 497.

are a concern of the Law of Nations. Cessions of territory made to private persons and to corporations[1] by native tribes or by States outside the dominion of the Law of Nations do not fall within the sphere of International Law, neither do cessions of territory by native tribes made to States[2] which are members of the Family of Nations. On the other hand, cession of territory made to a member of the Family of Nations by a State as yet outside that family is real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family.[3]

Object of cession.

§ 215. The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State. However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of the land, they cannot be ceded without a piece of land.[4]

The controverted question whether permanently neutralised parts of a not permanently neutralised State can be ceded to another State must be answered in the affirmative,[5] although the Powers certainly can exercise an intervention by right. On the other hand, a permanently neutralised State could not, except in the case of mere frontier regulation, cede a part of its neutralised territory to another State without the consent of the Powers. Nor could a State under suzerainty or protectorate

[1] See above, § 209, No. 2.
[2] See below, §§ 221 and 222.
[3] See above, § 103.
[4] See above, §§ 175 and 185.
[5] Thus in 1860 Sardinia ceded her neutralised provinces of Chablais and Faucigny to France. (See above, § 207.)

cede a part or the whole of its territory to a third State without the consent of the superior State. Thus, the Ionian Islands could not in 1863 have merged in Greece without the consent of Great Britain, which exercised a protectorate over these islands.

Form of cession.

§ 216. The only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war, and the cession may be one with or without compensation.

If a cession of territory is the outcome of war, it is the treaty of peace which stipulates the cession among its other provisions. Such cession is regularly one without compensation, although certain duties may be imposed upon the acquiring State, as, for instance, of taking over a part of the debts of the ceding State corresponding to the extent and importance of the ceded territory, or that of giving the individuals domiciled on the ceded territory the option to retain their old citizenship or, at least, to emigrate.

Cessions which are the outcome of peaceable negotiations may be agreed upon by the interested States from different motives and for different purposes. Thus Austria, during war with Prussia and Italy in 1866, ceded Venice to France as a gift, and some weeks afterwards France on her part ceded Venice to Italy. The Duchy of Courland ceded in 1795 its whole territory to and voluntarily merged thereby in Russia, and in the same way the then Free Town of Mulhouse merged in France in 1798.

Cessions have in the past often been effected by transactions which are analogous to transactions in

private business life. As long as absolutism was reigning over Europe, it was not at all rare for territory to be ceded in *marriage contracts* or by *testamentary dispositions*.[1] In the interest of frontier regulations, but also for other purposes, *exchanges* of territory frequently take place. *Sale* of territory is quite usual; as late as 1868 Russia sold her territory in America to the United States for 7,200,000 dollars, and in 1899 Spain sold the Caroline Islands to Germany for 25,000,000 pesetas. *Pledge* and *lease* are also made use of. Thus, the then Republic of Genoa pledged Corsica to France in 1768, Sweden pledged Wismar to Mecklenburg in 1803; China leased in 1898 Kiaochau to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, and Port Arthur to Russia.[2]

Whatever may be the motive and the purpose of

[1] Phillimore, I. §§ 274–276, enumerates many examples of such cession. The question whether the monarch of a State under absolute government could nowadays by a testamentary disposition cede territory to another State must, I believe, be answered in the affirmative. The case may become practical after the death of King Leopold II. of Belgium, who made in 1889 the following "will:"

"We, Leopold II., King of the Belgians, Sovereign of the Congo Free State, wishing to assure to our beloved country the fruits of the work we have for a long time prosecuted in the African continent, with the generous and devoted assistance of many Belgians; in the conviction that we shall thus contribute to secure for Belgium, she herself being willing, the necessary outlets for her commerce, and shall open fresh channels of industry for her children, declare by these presents that we bequeath and transmit to Belgium, after our death, all our sovereign rights to the Congo Free State, such as have been recognised by the declarations, conventions, and treaties, drawn up since 1884, on the one hand between the International Association of the Congo, and, on the other hand, the Free State, as well as all the property, rights, and advantages accruing from such sovereignty. Until such time as the Legislature of Belgium shall have stated its intentions as to the acceptance of these dispositions, the sovereignty shall be exercised collectively by the council of three administrators of the Free State and by the Governor-General."

[2] See above, § 171, No. 3. Cession may also take place under the disguise of an agreement according to which territory comes under the "administration" of a foreign State. (See above, § 171, No. 2.)

the transaction, and whatever may be the compensation, if any, for the cession, the ceded territory is transferred to the new sovereign with all the international obligations[1] locally connected with the territory (*Res transit cum suo onere*, and *Nemo plus juris transferre potest, quam ipse habet*).

Tradition of the ceded Territory.

§ 217. The treaty of cession must be followed by actual tradition of the territory to the new owner State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such war in the military occupation of the State to which it is now ceded. But the validity of the cession does not depend upon tradition,[2] the cession being completed by ratification of the treaty of cession, and the capability of the new owner to cede the acquired territory to a third State at once without taking actual possession of it.[3] But of course the new owner State cannot exercise its territorial supremacy thereon until it has taken physical possession of the ceded territory.

Veto of third Powers.

§ 218. As a rule, no third Power has the right of *veto* with regard to a cession of territory. Exceptionally, however, such right may exist; it may be that a third Power has by a previous treaty acquired a right of pre-emption concerning the ceded territory, or that some early treaty has created another obstacle to the cession, as, for instance, in the case of permanently neutralised parts of a not-permanently

[1] How far a succession of States takes place in the case of cession of territory has been discussed above, § 84.

[2] This is controversial. Many writers—see, for instance, Rivier, I. p. 203—oppose the opinion presented in the text.

[3] Thus France, to which Austria ceded in 1859 Lombardy, ceded this territory on her part to Sardinia without previously having actually taken possession of it. (See Ullmann, § 86.)

neutralised State.[1] And the Powers have certainly the right of *veto* in case a permanently neutralised State desires to increase its territory by acquiring land through cession from another State.[2] But even where no right of *veto* exists, a third Power might intervene for political reasons. For there is no duty on the part of third States to acquiesce in such cessions of territory as endanger the balance of power or are otherwise of vital importance.[3] And a strong State will practically always interfere in case a cession of such kind is agreed upon as menaces its vital interests. Thus, when in 1867 the then reigning King of Holland proposed to sell Luxemburg to France, the North German Confederation intervened, and the cession was not effected, but Luxemburg became permanently neutralised.

Plebiscite and option.

§ 219. As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto* by the cession subjects of the acquiring State. The hardship involved in the fact that in all cases of cession the inhabitants of the territory lose their old citizenship and are handed over to a new Sovereign whether they like it or not, has created a movement in favour of the claim that no cession shall be valid before the inhabitants have by a plebiscite[4] given their consent to the cession. And several treaties[5] of cession concluded during the nineteenth century stipulate that the cession shall only be valid provided the inhabitants consent to it

[1] See above, § 215.
[2] See above, § 209.
[3] See above, § 136.
[4] See Stoerk, Option und Plebiscite (1879); Rivier, I. p. 204; Freudenthal, Die Volksabstimmung bei Gebietsabtretungen und Eroberungen (1891); Bonfils, No. 570; Despagnet, No. 400; Ullmann, § 87.
[5] See Rivier, I. p. 210, where all these treaties are enumerated.

through a plebiscite. But it is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite. The necessities of international policy may now and then allow or even demand such a plebiscite, but in most cases they will not allow it.

The hardship of the inhabitants being handed over to a new Sovereign against their will can be lessened by a stipulation in the treaty of cession binding the acquiring State to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration. Many treaties of cession concluded during the second half of the nineteenth century contain this stipulation. But it must be emphasised that, failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of foreigners and endanger the safety of the acquiring State. The option to emigrate within a certain period, which is frequently stipulated in behalf of the inhabitants of the ceded territory, is another means of averting the charge that inhabitants are handed over to a new Sovereign against their will. Thus article 2 of the Peace Treaty of Frankfort, 1871, which ended the Franco-German war, stipulated that the French inhabitants of the ceded territory of Alsace and Lorraine should up to October 1, 1872, enjoy the privilege of transferring their domicile from the ceded territory to French soil.[1]

[1] The important question whether subjects of the ceding States who are born on the ceded territory but have their domicile abroad become *ipso facto* by the cession subjects of the acquiring State, must, I think, be answered in the negative. Therefore, Frenchmen born in Alsace but domiciled at the time of the

XIII

Occupation

Hall, §§ 32–34—Westlake, I. pp. 96–111, 119–133—Lawrence, §§ 92–96—Phillimore, I. §§ 236–250—Twiss, I. §§ 118–126—Halleck, I. p. 154—Taylor, §§ 221–224—Walker, § 9—Wharton, I. § 2—Wheaton, §§ 165–174—Bluntschli, §§ 278–283—Hartmann, § 61—Heffter, § 70—Holtzendorff in Holtzendorff, II. pp. 255–266—Gareis, § 70—Liszt, § 10—Ullmann, §§ 82–85—Bonfils, Nos. 536–563—Despagnet, Nos. 401–409—Pradier-Fodéré, II. Nos. 784–802—Rivier, I. pp. 188–197—Calvo, I. §§ 266–282—Fiore, II. Nos. 841–849—Martens, I. § 90—Tartarin, "Traité de l'occupation" (1873)—Westlake, Chapters, pp. 155–187—Heimburger, "Der Erwerb der Gebietshoheit" (1888), pp. 103–155—Salomon, "L'occupation des territoires sans maître" (1889)—Jèze, "Étude théorique et pratique sur l'occupation, etc." (1896).

Conception of Occupation.

§ 220. Occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State. Occupation as a mode of acquisition differs from subjugation [1] chiefly in so far as the conquered and afterwards annexed territory has hitherto belonged to another State. Again, occupation differs from cession in so far as through cession the acquiring State receives sovereignty over the respective territory from the former owner State. In contradistinction to cession, which is a derivative mode of acquisition, occupation is therefore an original mode. And it must be emphasised that occupation can only take place by and for a State ; [2] it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance.

cession in Great Britain, have not lost their French citizenship through the cession.

[1] See below, § 236.
[2] See above, § 209.

Object of Occupation.

§ 221. Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, as *e.g.* an island, or inhabited by natives whose community is not to be considered as a State. Even civilised individuals may live and have private property on a territory without any union by them into a State proper which exercises sovereignty over such territory. And natives may live on a territory under a tribal organisation which need not be considered a State proper. But a part or the whole of the territory of any State, even although such State is entirely outside the Family of Nations, is not a possible object of occupation, and it can only be acquired through cession[1] or subjugation. On the other hand, a territory which belonged at one time to a State but has been afterwards abandoned, is a possible object for occupation on the part of another State.[2]

Occupation how effected.

§ 222. Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of and establishing an administration over the territory in the name of and for the acquiring State. Occupation thus effected is *real* occupation, and, in contradistinction to "fictitious" occupation, is named "effective" occupation. Possession and administration are the two essential facts that constitute an effective occupation.

(1) The territory must really be taken into possession by the occupying State. For this purpose it is necessary that the respective State has taken the territory under its sway (*corpus*) with the intention to acquire sovereignty over it (*animus*). This can only be done by a settlement on the territory accompanied by some formal act which

[1] See above, § 210.

[2] See below, §§ 228 and 247.

announces both that the territory has been taken possession of and that the possessor intends to keep it under his sovereignty. The necessary formal act is usually performed either by the publication of a proclamation or by the hoisting of a flag. But such formal act by itself constitutes fictitious occupation only, unless there is left on the territory a settlement which is able to keep up the authority of the flag. On the other hand, it is irrelevant whether or not some agreement is made with the natives by which they submit themselves to the sway of the occupying State. Any such agreement is usually neither understood nor appreciated by them, and even if the natives really do understand the meaning, such agreements have a moral value only.[1]

(2) After having, in the aforementioned way, taken possession of a territory, the possessor must establish some kind of administration thereon which shows that the territory is really governed by the new possessor. If within a reasonable time after the act of taking possession the possessor does not establish some responsible authority which exercises governing functions, there is then no effective occupation, since in fact no sovereignty of a State is exercised over the territory.

Inchoate Title of Discovery.

§ 223. In former times the two conditions of possession and administration which now make the occupation effective were not considered necessary for the acquisition of territory through occupation. In the age of the discoveries, States maintained that the fact of discovering a hitherto unknown territory

[1] If an agreement with natives were legally important, the respective territory would be acquired by cession, and not by occupation. But although it is nowadays quite usual to obtain a cession from a native chief, this is, nevertheless, not cession in the technical sense of the term in International Law; see above, § 214.

was sufficient reason for considering it as acquired through occupation by the State in whose service the discoverer made his explorations. And although later on a real taking possession of the territory was considered necessary for its occupation, it was not until the eighteenth century that the writers on the Law of Nations postulated an *effective* occupation as necessary,[1] and it was not until the nineteenth century that the practice of the States accorded with this postulate. But although nowadays discovery does not constitute acquisition through occupation, it is nevertheless not without importance. It is agreed that discovery gives to the State in whose service it was made an *inchoate* title; it "acts as a temporary bar to occupation by another State"[2] within such a period as is reasonably sufficient for effectively occupying the discovered territory. If such period lapses without any attempt by the discovering State to turn its *inchoate* title into a *real* title of occupation, such inchoate title perishes, and any other State can now acquire the territory by means of an effective occupation.

Notification of Occupation to other Powers.

§ 224. No rule of the Law of Nations exists which makes notification of occupation to other Powers a necessary condition of its validity. But as regards all future occupations on the *African* continent the Powers assembled at the Berlin Congo Conference in 1884–1885 have by article 34 of the General Act of this Conference stipulated that occupation shall be notified to one another, so that such notification is now a condition of the validity of an occupation in Africa. And there is no doubt that in time this rule will either by custom or by

[1] See Vattel, I. § 208. [2] Thus Hall, § 32.

treaty be extended from occupations in Africa to occupations everywhere else.

Extent of Occupation.

§ 225. Since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to reach over so much territory as is effectively occupied. In practice, however, the interested States have neither in the past nor in the present acted in conformity with such a rule; on the contrary, they have always tried to attribute to their occupation a much wider area. Thus it has been maintained that an effective occupation of the land at the mouth of a river is sufficient to bring under the sovereignty of the occupying State the whole territory through which such river and its tributaries run up to the very crest of the watershed.[1] Again, it has been maintained that, when a coast line has been effectively occupied, the extent of the occupation reaches up to the watershed of all such rivers as empty into the coast line.[2] And it has, thirdly, been asserted that effective occupation of a territory extends the sovereignty of the possessor also over neighbouring territories as far as it is necessary for the integrity, security, and defence of the really occupied land.[3] But all these and other fanciful assertions have no basis to rest upon. In truth, no general rule can be laid down beyond the above, that occupation reaches as far as it is effective. How far it is effective, is a question of the special case. It is obvious that when the agent of a State takes posses-

[1] Claim of the United States in the Oregon Boundary dispute (1827) with Great Britain. See Twiss, I. §§ 126 and 127 and his "The Oregon Question examined" (1846); Phillimore, I. § 250; Hall, § 34.

[2] Claim of the United States in their dispute with Spain concerning the boundary of Louisiana (1803), approved of by Twiss, I. § 125.

[3] This is the so-called "right of contiguity," approved of by Twiss, I. §§ 124 and 131.

sion of a territory and makes a settlement on a certain spot of it, he intends thereby to acquire a vast area by his occupation. Everything depends, therefore, upon the fact how far around the settlement or settlements the established responsible authority that governs the territory in the name of the possessor succeeds in gradually extending the established sovereignty. The payment of a tribute on the part of tribes settled far away, the fact that flying columns of the military or the police sweep, when necessary, remote spots, and many other facts, can show how far round the settlements the possessor is really able to assert the established authority. But it will always be difficult to mark exactly in this way the boundary of an effective occupation, since naturally the tendency prevails to extend the sway constantly and gradually over a wider area. It is, therefore, a well-known fact that disputes concerning the boundaries of occupations can only rarely be decided on the basis of strict law; they must nearly always be compromised, whether by a treaty or by arbitration.[1]

Protectorate as Precursor of Occupation.

§ 226. The growing desire to acquire vast territories as colonies on the part of States unable to occupy effectively such territories at once has, in the second half of the nineteenth century, led to the contracting of agreements with the chiefs of natives inhabiting unoccupied territories, by which these chiefs commit themselves to the "protectorate" of States that are members of the Family of Nations. These so-called protectorates are certainly not protectorates in the technical sense of the term desig-

[1] The Institute of International Law, in 1887, at its meeting in Lausanne, adopted a "Projet de déclaration internationale relatif aux occupations de territoires," comprising ten articles; see Annuaire X. p. 201.

nating the relation that exists between a strong and a weak State through a treaty by which the weak State surrenders itself into the protection of the strong and transfers to the latter the management of its more important international relations.[1] Neither can they be compared with the protectorate of members of the Family of Nations exercised over such non-Christian States as are outside that family,[2] because the respective chiefs of natives are not the heads of States, but heads of tribal communities only. Such agreements, although they are named "Protectorates," are nothing else than steps taken to exclude other Powers from occupying the respective territories. They give, like discovery, an inchoate title, and are preparations and precursors of future occupations.

Spheres of influence.

§ 227. The uncertainty of the extent of an occupation and the tendency of every colonising State to extend its occupation constantly and gradually into the interior, the "Hinterland," of an occupied territory, has led several States which have colonies in Africa to secure for themselves "spheres of influence" by international treaties with other interested Powers. Spheres of influence are therefore the names of such territories as are exclusively reserved for future occupation on the part of a Power which has effectively occupied adjoining territories. In this way disputes are avoided for the future, and the interested Powers can gradually extend their sovereignty over vast territories without coming into conflict with other Powers. Thus, to give some examples, Great Britain has concluded treaties regarding spheres of influence with Portugal[3]

[1] See above, §§ 92 and 93.
[2] See above, § 94.
[3] See Martens, N.R.G., 2nd ser. XVIII. p. 558.

in 1890, with Italy[1] in 1891, with Germany[2] in 1886 and 1890, and with France[3] in 1898.[4]

Consequences of Occupation.

§ 228. As soon as a territory is occupied by a member of the Family of Nations, it comes within the sphere of the Law of Nations, because it constitutes a portion of the territory of a subject of International Law. No other Power can acquire it hereafter through occupation, unless the present possessor has either intentionally withdrawn from it or has been successfully driven away by the natives without making efforts, or without capacity, to re-occupy it.[5] On the other hand, the Power which now exercises sovereignty over the occupied territory is hereafter responsible for all events of international importance on the territory. Such Power has in especial to keep up a certain order among the native tribes to restrain them from acts of violence against neighbouring territories, and has eventually to punish them for such acts.

A question of some importance is how far occupation affects private property of the inhabitants of the occupied territory. As according to the modern conception of State territory the latter is not identical with private property of the State, occupation brings a territory under the sovereignty only of the occupying State, and therefore in no wise touches or affects existing private property of the inhabitants. In the age of the discoveries, occupation was indeed considered to include a title to property over the

[1] See Martens, N.R.G., 2nd ser. XVIII. p. 175.

[2] See Martens, N.R.G., 2nd ser. XII. p. 298, and XVI. p. 895.

[3] See Martens, N.R.G., 2nd ser. XXIX. p. 116.

[4] Protectorates and Spheres of Influence are exhaustively treated in Hall, Foreign Powers and Jurisdiction of the British Crown, §§ 92–100; but Hall fails to distinguish between protectorates over Eastern States and protectorates over native tribes.

[5] See below, § 247.

whole occupied land, but nowadays this can no longer be maintained. If, according to the Municipal Law of a State, occupation does give such title to property, there is a conflict between International and Municipal Law which ought not to be upheld.[1]

XIV

Accretion

Grotius, II. c. 8, §§ 8–16—Hall, § 37—Lawrence, § 100—Phillimore, I. §§ 240–241—Twiss, I. §§ 131 and 154—Bluntschli, §§ 294–295—Hartmann, § 61—Heffter, § 69—Holtzendorff in Holtzendorff, II. pp. 266–268—Gareis, § 20—Liszt, § 10—Ullmann, § 81—Bonfils, No. 533—Despagnet, No. 389—Pradier-Fodéré, II. Nos. 803–816—Rivier, I. pp. 179–180—Calvo, I. § 266—Fiore, II. No. 852—Martens, I. § 90—Heimburger, "Der Erwerb der Gebietshoheit" (1888), p. 107.

Conception of Accretion.

§ 229. Accretion is the name for the increase of land through new formations. Such new formations may be a modification only of the existing State territory, as, for instance, where an island rises within such river or a part of it as is totally within the territory of one and the same State; and in such case there is no increase of territory to correspond with the increase of land. On the other hand, many new formations occur which really do enlarge the territory of the State to which they accrue, as, for instance, where an island rises within the maritime belt.[2] And it is a customary rule of the Law of Nations that enlargement of territory, if any, created

[1] See above, §§ 20–25.

[2] Those writers who, as Ullmann, § 81, consider accretion a modification only of the existing territory, overlook this second kind of new formations. Since through the rise of an island within the maritime belt the extent of the latter must now be measured from the shore of such island, the territory of the respective State is indeed enlarged.

through new formations, takes place *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty. Accretion must therefore be considered as a mode of acquiring territory.

Different kinds of Accretion.

§ 230. New formations through accretion may be artificial or natural. They are artificial if they are the outcome of human work. They are natural if they are produced through the operation of nature. And within the circle of natural formations different kinds must again be distinguished—namely, alluvions, deltas, new-born islands, and abandoned river beds.

Artificial Formations.

§ 231. Artificial formations are embankments, breakwaters, dykes, and the like, built along the river or the coast line of the sea. As such artificial new formations along the bank of a boundary river may more or less push the volume of water so far as to encroach upon the other bank of the river, and as no State is allowed to alter the natural condition of its own territory to the disadvantage[1] of the natural conditions of a neighbouring State territory, a State cannot build embankments, and the like, of such kind without a previous agreement with the neighbouring State. But every riparian State of the sea may construct such artificial formations as far into the sea beyond the low-water mark as it likes and thereby gain considerably in land and also in territory, since the extent of the at least three miles wide maritime belt is now to be measured from the extended shore.

Alluvions.

§ 232. Alluvion is the name for an accession of land washed up on the sea-shore or on a river-bank by the waters. Such accession is as a rule produced by a slow and gradual process, but sometimes also

[1] See above, § 127.

through a sudden act of violence, the stream detaching a portion of the soil from one bank of a river, carrying it over to the other bank, and embedding it there so as to be immovable (*avulsio*). Through alluvions the land and also the territory of a State may be considerably enlarged. For, if the alluvion takes place on the shore, the extent of the territorial maritime belt is now to be measured from the extended shore. And, if the alluvion takes place on the one bank of a boundary river, and the course of the river is thereby naturally so altered that the waters in consequence cover a part of the other bank, the boundary line, which runs through the middle or through the mid-channel,[1] may thereby be extended into former territory of the other riparian State.

Deltas.

§ 233. Similar to alluvions are Deltas. Delta is the name for a tract of land at the mouth of a river shaped like the Greek letter Δ, which land owes its existence to a gradual deposit by the river of sand, stones, and earth on one particular place at its mouth. As the Deltas are continually increasing, the accession of land they produce may be very considerable, and such accession is, according to the Law of Nations, considered an accretion to the land of the State to whose territory the mouth of the respective river belongs, although the Delta may be formed outside the territorial maritime belt. It is evident that in the latter case an increase of territory is the result, since the at least three miles wide maritime belt is now to be measured from the shore of the Delta.

New-born Islands.

§ 234. The same and other natural processes which create alluvions on the shore and banks, and Deltas at the mouths of rivers, lead to the birth of new islands. If they rise on the High Seas outside the

[1] See above, § 199, No. 1.

territorial maritime belt, they are no State's land and may be acquired through occupation on the part of any State. But if they rise in rivers, lakes, and within the maritime belt, they are, according to the Law of Nations, considered accretions to the neighbouring land. It is for this reason that such new islands in boundary rivers as rise within the boundary line of one of the riparian States accrue to the land of such State, and that, on the other hand, such islands as rise upon the boundary line are divided into parts by it, the respective parts accruing to the land of the riparian States concerned. If an island rises within the territorial maritime belt, it accrues to the land of the riparian State, and the extent of the maritime belt is now to be measured from the shore of the new-born island.

An illustrative example is the case[1] of the "Anna." In 1805, during war between Great Britain and Spain, the British privateer "Minerva" captured the Spanish vessel "Anna" near the mouth of the River Mississippi. When brought before the British Prize Court, the United States claimed the captured vessel on the ground that she was captured within the American territorial maritime belt. Lord Stowell gave judgment in favour of this claim, because, although it appeared that the capture did actually take place more than three miles off the coast of the continent, the place of capture was within three miles of some small mud-islands composed of earth and trees drifted down into the sea.

Abandoned River-beds.

§ 235. It happens sometimes that a river abandons its bed entirely or dries up altogether. If

[1] See 5 Rob. 373.

such river was a boundary river, the abandoned bed is now the natural boundary. But often the old boundary line cannot be ascertained, and in such cases the boundary line is considered to run through the middle of the abandoned bed, and the portions *ipso facto* accrue to the land of the riparian States, although the territory of one of these States may become thereby enlarged, and that of the other diminished.

XV

Subjugation

Hall, §§ 204–205—Lawrence, § 98—Halleck, II. pp. 467–498—Taylor, § 220—Walker, § 11—Wheaton, § 165—Bluntschli, §§ 287–289, 701, 702—Heffter, § 178—Liszt, § 10—Ullmann, §§ 81 and 169—Bonfils, No. 535—Despagnet, Nos. 395–398—Rivier, I. pp. 181, 182, 436–441—Calvo, V. § 3117, 3118—Fiore, II. No. 863; III. No. 1693—Martens, I. § 91—Holtzendorff, "Eroberung und Eroberungsrecht" (1871)—Heimburger, "Der Erwerb der Gebietshoheit" (1888), pp. 121–132—Westlake in The Law Quarterly Review, XVII. (1901), p. 392.

Conception of Conquest and of Subjugation.

§ 236. Conquest is the taking possession of enemy territory through military force in time of war. Conquest alone does not *ipso facto* make the conquering State the sovereign of the conquered territory, although such territory comes through conquest for the time under the sway of the conqueror. Conquest is only a mode of acquisition if the conqueror has, after having firmly established the conquest, formally annexed the territory. Such annexation makes the enemy State cease to exist and brings thereby the war to an end. And as such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives a title and is a mode of acquiring

territory.[1] It is, however, quite usual to speak of conquest as a title, and everybody knows that subjugation after conquest is thereby meant. But it must be specially mentioned that, if a belligerent conquers a part of the enemy territory and makes afterwards the vanquished State cede the conquered territory in the treaty of peace, the mode of acquisition is not subjugation but cession.[2]

Subjugation in Contradistinction to Occupation.

§ 237. Some writers[3] maintain that subjugation is only a special case of occupation, because, as they assert, through conquest the enemy territory becomes no State's land and the conqueror can acquire it by turning his military occupation into absolute occupation. Yet this opinion cannot be upheld because military occupation, which is conquest, in no way makes enemy territory no State's land. Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror. Annexation turns the conquest into subjugation. It is the very annexation which *uno actu* makes the vanquished State cease to exist and brings the territory under the conqueror's sovereignty. Thus the subjugated territory has not for one moment been no State's land, but comes from the enemy's into the conqueror's sovereignty, although not through cession, but through annexation.

Justification of Subjugation as a Mode of Acquisition.

§ 238. As long as a Law of Nations has been in existence, the States as well as the vast majority of writers have recognised subjugation as a mode of

[1] Concerning the distinction between conquest and subjugation, see below, vol. II. § 264.

[2] See above, §§ 216 and 219.

[3] Holtzendorff, II. p. 255; Ullmann, § 81; Heimburger, p. 128; Salomon, p. 24.

acquiring territory. Its justification lies in the fact that war is a contention between States for the purpose of overpowering one another. States which go to war know beforehand that they risk more or less their very existence, and that it may be a necessity for the victor to annex the conquered enemy territory, be it in the interest of national unity or of safety against further attacks, or for other reasons. Maybe, in some extremely dim and distant future, war will disappear, but, as long as war exists, subjugation will also be recognised. If some writers[1] refuse to recognise subjugation at all as a mode of acquiring territory, they show a lack of insight into the historical development of States and nations.

Subjugation of the whole or of a part of Enemy Territory.

§ 239. Subjugation is as a rule a mode of acquiring the entire enemy territory. The actual process is regularly that the victor destroys the enemy military forces, takes possession of the enemy territory, and then annexes it, although the head and the Government of the extinguished State might have fled, might protest, and still keep up a claim. Thus after the war with Austria and her allies in 1866, Prussia subjugated the territories of the Duchy of Nassau, the Kingdom of Hanover, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Maine, and Great Britain subjugated in 1900 the territories of the Orange Free State and the South African Republic.

But it is possible, although it will nowadays hardly occur, for a State to conquer and annex a part of enemy territory, whether the war ends by a Treaty of Peace in which the vanquished State, without

[1] Bonfils, No. 535; Fiore, II. No. 863 and III. No. 1693. See also Despagnet, Nos. 395–398.

ceding the conquered territory, submits silently[1] to the annexation, or by simple cessation of hostilities.[2]

It must, however, be emphasised that such a mode of acquiring a part of enemy territory is totally different from forcibly taking possession of a part thereof during the continuance of war. Such a conquest, although the conqueror may intend to keep the conquered territory and therefore annex it, is not a title as long as the war has not terminated either actually through simple cessation of hostilities or through a Treaty of Peace. Therefore, the practice, which sometimes prevails, of annexing a conquered part of enemy territory during war cannot be approved. Concerning subjugation either of the whole or of a part of enemy territory, it must be asserted that annexation gives a title only after a *firmly established* conquest. So long as war continues, conquest is not firmly established.[3]

Consequences of Subjugation.

§ 240. Although subjugation is an original mode of acquisition, since the sovereignty of the new acquirer is not derived from that of the former owner State, the new owner State is nevertheless the successor of the former owner State as regards many points which have been discussed above (§ 82). It must be specially mentioned that, as far as the Law of Nations is concerned, the subjugator does not acquire the private property of the inhabitants of the annexed territory. Being now their Sovereign, the subjugating State may indeed impose any burdens it pleases on its new subjects, it may even confiscate their private property, since a Sovereign State can do what it likes with its subjects, but subjugation itself does not touch or affect private property.

[1] See below, vol. II. § 273.

[2] See below, vol. II. § 263.

[3] See below, vol. II. § 60, concerning guerilla war after the termination of real war. Many writers, however, deny that a conquest is firmly established as long as guerilla war is going on.

As regards the national status of the subjects of the subjugated State, doctrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation become *ipso facto* by the subjugation [1] subjects of the subjugator. But the national status of such enemy subjects as are domiciled abroad and do not return, and further of such as leave the country before the annexation or immediately afterwards, is matter of dispute. Some writers maintain that these individuals do in spite of their absence become subjects of the subjugator, others emphatically deny it. Whereas the practice of the United States of America seems to be in conformity with the latter opinion,[2] the practice of Prussia in 1866 was in conformity with the former. Thus in the case of Count Platen-Hallermund, a Cabinet Minister of King George V. of Hanover, who left Hanover with his King before the annexation in 1866 and was in 1868 prosecuted for high treason before the Supreme Prussian Court at Berlin, this Court decided that the accused had become a Prussian subject through the annexation of Hanover.[3] I believe that a distinction must be made between those individuals who leave the country *before*, and those who leave it *after* annexation. The former are not under the sway of the subjugator at the time of annexation, and, since the personal supremacy of their home State terminates with the latter's extinction through annexation, they would seem to be outside the sovereignty of the subjugator. But those individuals who leave the country *after*

[1] The case is similar to that of cession; see above, § 219.

[2] See Halleck, II. p. 476.

[3] See Halleck, II. p. 476, on the one hand, and on the other Rivier, II. p. 436. Valuable opinions of Zachariae and Neumann, who deny that Count Platen was a Prussian subject, are printed in the Deutsche Strafrechts-Zeitung, 1868, pp. 304–320.

annexation leave it at a time when they have become subjects of the new Sovereign, and they therefore remain such subjects even after they have left the country, for there is no rule of the Law of Nations in existence which obliges a subjugator to grant the privilege of emigration [1] to the inhabitants of the conquered territory.

Different from the fact that enemy subjects become through annexation subjects of the subjugator is the question what position they acquire within the subjugating State. This question is one of Municipal, and not of International Law. The subjugator can, if he likes, allow them to emigrate and to renounce their newly acquired citizenship, and the Municipal Law of the subjugating State can put them in any position it likes, can in especial grant or refuse them the same rights as those which its citizens by birth enjoy.

Veto of third Powers.

§ 241. Although subjugation is an original mode of acquiring territory and no third Power has as a rule a right of intervention, the conqueror has not in fact an unlimited possibility of annexation of the territory of the vanquished State. When the balance of power is endangered or when other vital interests are at stake, third Powers can and will intervene, and history records many instances of such interventions. But it must be emphasised that the validity of the title of the subjugator does not depend upon recognition on the part of other Powers. And a mere protest of a third Power is of no legal weight either.

[1] Both Westlake and Halleck state that the inhabitants *must* have a free option to stay or leave the country; but there is no rule of International Law which imposes the duty upon a subjugator to grant this option.

XVI

PRESCRIPTION

Grotius, II. c. 4—Vattel, I. §§ 140–151—Hall, § 36—Westlake, I. pp. 92–94—Lawrence, § 99—Phillimore, I. §§ 251–261—Twiss, I. § 129—Taylor, §§ 218–219—Walker, § 13—Wheaton, § 164—Bluntschli, § 290—Hartmann, § 61—Heffter, § 12—Holtzendorff in Holtzendorff, II. p. 255—Ullmann, § 81—Bonfils, No. 534—Despagnet, No. 390—Pradier-Fodéré, II. Nos. 820–829—Rivier, I. pp. 182–184—Calvo, I. §§ 264–265—Fiore, II. Nos. 850–851—Martens, I. § 90—G. F. Martens, §§ 70–71—Bynkershoek, "Quaestiones juris publici," IV. c. 12—Heimburger, "Der Erwerb der Gebietshoheit" (1888) pp. 140–155.

Conception of Prescription.

§ 242. Since the existence of a science of the Law of Nations there has always been opposition to prescription as a mode of acquiring territory. Grotius rejected the usucaption of the Roman Law, yet adopted the same law's *immemorial* prescription [1] for the Law of Nations. But whereas a good many writers [2] still defend that standpoint, others [3] reject prescription altogether. Again, others [4] go beyond Grotius and his followers and do not require possession from time *immemorial*, but teach that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time.

This opinion would indeed seem to be correct, because it recognises theoretically what actually goes on in practice. There is no doubt that in the practice of the members of the Family of Nations a State is considered to be the lawful owner even of those parts of its territory of which originally it took

[1] See Grotius, II. c. 4, §§ 1, 7, 9.
[2] See, for instance, Heffter, § 12; Martens, § 90.
[3] G. F. Martens, § 71; Klüber, §§ 6 and 125; Holtzendorff, II. p. 255; Ullmann, § 81.
[4] Vattel, II. § 147; Wheaton, § 165; Phillimore, I. § 259; Hall, § 36; Bluntschli, § 290; Pradier-Fodéré, II. No. 825; Bonfils, No. 534, and many others.

possession wrongfully and unlawfully, provided only the possessor has been in undisturbed possession for such a length of time as is necessary to create the general conviction among the members of the Family of Nations that the present condition of things is in conformity with international order. Such prescription cannot be compared with the usucaption of Roman Law because the latter required *bona-fide* possession, whereas the Law of Nations recognises prescription both in cases where the State is in *bona-fide* possession and in cases where it is not. The basis of prescription in International Law is nothing else than general recognition [1] of a fact, however unlawful in its origin, on the part of the members of the Family of Nations. And prescription in International Law may therefore be defined as *the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.* Thus, prescription in International Law has the same rational basis as prescription in Municipal Law—namely, the creation of stability of order.

Prescription how effected.

§ 243. From the conception of prescription, as above defined, it becomes apparent that no general rule can be laid down as regards the length of time and other circumstances which are necessary to create a title by prescription. Everything depends upon the merits of the individual case. As long as

[1] This is pointed out with great lucidity by Heimburger, pp. 151–155; he rejects, however, prescription as a mode of acquiring territory, maintaining that there is a customary rule of International Law in existence according to which recognition can make good originally wrongful possession.

other Powers keep up protests and claims, neither is the actual exercise of sovereignty undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually ripen into that condition which is in conformity with international order. The question, at what time and under what circumstances such a condition of things arises, is not one of law but of fact. The question, for instance, whether Prussia, Austria, and Russia have now a good title by prescription to hold their respective formerly Polish territories, although the three partitions of Poland were wrongful and unlawful acts, must, I doubt not, be answered in the affirmative. For all the members of the Family of Nations have now silently acquiesced in the present condition of things, although as late as 1846 Great Britain and France protested against the annexation of the Republic of Cracow on the part of Austria. In spite of the fact that the Polish nation has not yet given up its hope of seeing a Polish State re-established on the former Polish territory, the general conviction among the members of the Family of Nations is that the present condition of things is in conformity with international order. When, to give another example, a State which originally held an island *mala fide* under the title by occupation, knowing well that this land had already been occupied by another State, has succeeded in keeping up its possession undisturbed for so long a time that the former possessor has ceased to protest and has silently dropped the claim, the conviction will be prevalent among the members of the Family of

Nations that the present condition of things is in conformity with international order. These examples show why a certain number of years [1] cannot be, once for all, fixed to create the title by prescription. There are indeed immeasurable and imponderable circumstances and influences besides the mere run of time [2] at work to create the conviction on the part of the members of the Family of Nations that in the interest of stability of order the present possessor should be considered the rightful owner of a territory. And these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ.

XVII

Loss of State Territory

Hall, § 34—Phillimore, I. §§ 284-295—Holtzendorff in Holtzendorff, II. pp. 274-279—Gareis, § 70—Liszt, § 10—Ullmann, § 89—Pradier-Fodéré, II. Nos. 850-852—Rivier, I. § 13—Fiore, II. No. 865—Martens, I. § 92.

Six modes of losing State Territory.

§ 244. To the five modes of acquiring sovereignty over territory correspond five modes of losing it—namely, cession, dereliction, operation of nature, subjugation, prescription. But there is a sixth mode of losing territory—namely, revolt. No special details are necessary with regard to loss of territory through

[1] Vattel (II. § 151) suggests that the members of the Family of Nations should enter into an agreement stipulating the number of years necessary for prescription, and David Dudley Field proposes the following rule (52) in his Outlines of an International Code: "The uninterrupted possession of territory or other property for fifty years by a nation excludes the claim of every other nation."

[2] Heffter's (§ 12) dictum, "Hundert Jahre Unrecht ist noch kein Tag Recht" is met by the fact that it is not the operation of time alone, but the co-operation of other circumstances and influences which creates the title by prescription.

subjugation, prescription, and cession, except that it is of some importance to repeat here that the historical cases of pledging, leasing, and giving territory to another State to administer are in fact, although not in theory, nothing else than cessions[1] of territory. But operation of nature, revolt, and dereliction must be specially discussed.

Operation of Nature.

§ 245. Operation of nature as a mode of losing corresponds to accretion as a mode of acquiring territory. Just as through accretion a State may become enlarged, so it may become diminished through the disappearance of land and other operations of nature. And the loss of territory through operation of nature takes place *ipso facto* by such operation. Thus, if an island near the shore disappears through volcanic action, the extent of the maritime territorial belt of the respective riparian State is hereafter to be measured from the low-water mark of the shore of the continent, instead of from the shore of the former island. Thus, further, if through a piece of land being detached by the current of a river from one bank and carried over to the other bank, the river alters its course and covers now part of the land on the bank from which such piece became detached, the territory of one of the riparian States may decrease through the boundary line being *ipso facto* transferred to the present middle or mid-channel of the river.

Revolt.

§ 246. Revolt followed by secession is a mode of losing territory to which no mode of acquisition corresponds.[2] Revolt followed by secession has,

[1] See above, §§ 171 and 216.

[2] The possible case where a province revolts, secedes from the mother country, and, after having successfully defended itself against the attempts of the latter to reconquer it, unites itself with the territory of another State, is a case of merger by cession of the whole territory.

as history teaches, frequently been a cause of loss of territory. Thus the Netherlands fell away from Spain in 1579, Belgium from the Netherlands in 1830, the United States of America from Great Britain in 1776, Brazil from Portugal in 1822, the former Spanish South American States from Spain in 1810, Greece from Turkey in 1830, Cuba from Spain in 1898, Panama from Colombia in 1903. The question at what time a loss of territory through revolt is consummated cannot be answered once for all, since no hard and fast rule can be laid down regarding the time when it can be said that a State broken off from another has established itself safely and permanently. The matter has, as will be remembered, been treated above (§ 74), in connection with recognition. It may well happen that, although such a seceded State is already recognised by a third Power, the mother country does not consider the territory to be lost and succeeds in reconquering it.

Derelic-tion.

§ 247. Dereliction as a mode of losing corresponds to occupation as a mode of acquiring territory. Dereliction frees a territory from the sovereignty of the present owner State. Dereliction is effected through the owner State's complete abandonment of the territory with the intention of withdrawing from it for ever, thus relinquishing sovereignty over it. Just as occupation[1] requires, first, the actual taking into possession (*corpus*) of territory and, secondly, the intention (*animus*) to acquire sovereignty over it, so dereliction requires, first, actual abandonment of a territory, and, secondly, the intention to give up sovereignty over it. Actual abandonment alone does not involve dereliction as long as it must be presumed that the owner has the will and ability

[1] See above, § 222.

to retake possession of the territory. Thus, for instance, if the rising of natives forces a State to withdraw from a territory, such territory is not derelict as long as the former possessor is able and makes efforts to retake possession. It is only when a territory is really derelict that any State may acquire it through occupation.[1] History knows of several such cases. But very often, when such occupation of derelict territory occurs, the former owner protests and tries to prevent the new occupier from acquiring it.[2]

[1] See above, § 228.

[2] See Hall, § 34, where the case of Santa Lucia and that of Delagoa Bay are discussed.

CHAPTER II

THE OPEN SEA

I

Rise of the Freedom of the Open Sea

Grotius, II. c. 2, § 3—Pufendorf, IV. c. 5, § 5—Vattel, I. §§ 279–286—Hall, § 40—Westlake, I. pp. 161–162—Phillimore, I. §§ 172–179—Taylor, §§ 242–246—Walker, Science, pp. 163–171—Wheaton, §§ 186–187—Hartmann, § 64—Heffter, § 73—Stoerk in Holtzendorff, II. pp. 483–490—Bonfils, Nos. 573–576—Despagnet, No. 410—Pradier-Fodéré, II. Nos. 871–874—Calvo, I. §§ 347–352—Fiore, II. Nos. 718–726—Martens, I. § 97—Perels, § 4—Azuni, "Diritto maritimo" (1796), I, c. I. Article III.—Cauchy, "Le droit maritime international considéré dans ses origines," 2 vols. (1862)—Nys, "Les origines du droit international" (1894), pp. 377–388—Castel, "Du principe de la liberté des mers" (1900), pp. 1–15.

Former Claims to Control over the Sea.

§ 248. In antiquity and the first half of the Middle Ages navigation on the Open Sea was free to everybody. According to Ulpianus,[1] the sea is open to everybody by nature, and, according to Celsus,[2] the sea, like the air, is common to all mankind. Since no Law of Nations in the modern sense of the term existed during antiquity and the greater part of the Middle Ages, no importance is to be attached to the pronouncement of Antoninus Pius, Roman Emperor from 138 to 161:—"Being[3] the Emperor of the world, I am consequently the law of the sea." Nor

[1] L. 13, pr. D. VIII. 4: mari quod natura omnibus patet.

[2] L. 3 D. XLIII. 8: Maris communem usum omnibus hominibus ut aeris.

[3] L. 9 D. XIV. 2: *ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης.*

is it of importance that the Emperors of the old German Empire, who were considered to be the successors of the Roman Emperors, styled themselves among other titles "King of the Ocean." Real claims to sovereignty over parts of the Open Sea begin, however, to be made in the second half of the Middle Ages. And there is no doubt whatever that at the time when the modern Law of Nations gradually rose it was the conviction of the States that they could extend their sovereignty over certain parts of the Open Sea. Thus, the Republic of Venice was recognised as the Sovereign over the Adriatic Sea, and the Republic of Genoa as the Sovereign of the Ligurian Sea. Portugal claimed sovereignty over the whole of the Indian Ocean and of the Atlantic south of Morocco, Spain over the Pacific and the Gulf of Mexico, both Portugal and Spain basing their claims on two Papal Bulls promulgated by Alexander VI. in 1493, which divided the new world between these Powers. Sweden and Denmark claimed sovereignty over the Baltic, Great Britain over the Narrow Seas, the North Sea, and the Atlantic from the North Cape to Cape Finisterre.

These claims have been more or less successfully asserted for several hundreds of years. They were favoured by a number of different circumstances, such as the maintenance of an effective protection against piracy for instance. And numerous examples can be adduced which show that such claims have more or less been recognised. Thus, Frederick III., Emperor of Germany, had in 1478 to ask the permission of Venice for a transportation of corn from Apulia through the Adriatic Sea.[1] Thus, Great Britain in the seventeenth century compelled

[1] See Walker, History, I. p. 163.

foreigners to take out an English licence for fishing in the North Sea; and when in 1636 the Dutch attempted to fish without such licence, they were attacked and compelled to pay £30,000 as the price for the indulgence.[1] Again, when Philip II. of Spain was in 1554 on his way to England to marry Queen Mary, the British Admiral, who met him in the "British Seas," fired on his ship for flying the Spanish flag. And the King of Denmark, when returning from a visit to James I. in 1606, was forced by a British captain, who met him off the mouth of the Thames, to strike the Danish flag.

Practical Expression of claims to Maritime Sovereignty.

§ 249. Maritime sovereignty found expression in maritime ceremonials at least. Such State as claimed sovereignty over a part of the Open Sea required foreign vessels navigating on that part to honour its flag as a symbol of recognition of its sovereignty. So late as 1805 the British Admiralty Regulations contained an order[2] to the effect that "when any of His Majesty's ships shall meet with the ships of any foreign Power within His Majesty's Seas (which extend to Cape Finisterre), it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonour to be done to His Majesty."

But apart from maritime ceremonials maritime sovereignty found expression in the levying of tolls from foreign ships, in the interdiction of fisheries to foreigners, and in the control or even the prohibition of foreign navigation. Thus, Portugal and Spain

[1] This and the two following examples are quoted by Hall, § 40.
[2] Quoted by Hall, § 40.

attempted, after the discovery of America, to keep foreign vessels altogether out of the seas over which they claimed sovereignty. The magnitude of this claim created an opposition to the very existence of such rights. English, French, and Dutch explorers and traders navigated on the Indian Ocean and the Pacific in spite of the Spanish and Portuguese interdictions. And when, in 1580, the Spanish ambassador Mendoza lodged a complaint with Queen Elizabeth against Drake for having made his famous voyage to the Pacific, Elizabeth answered that vessels of all nations could navigate on the Pacific, since the use of the sea and the air is common to all, and that no title to the ocean can belong to any nation, since neither nature nor regard for the public use permits any possession of the ocean.[1]

Grotius's Attack on Maritime Sovereignty.

§ 250. Queen Elizabeth's attitude was the germ out of which grew gradually the present freedom of the Open Sea. Twenty-nine years after her answer to Mendoza, in 1609, appeared Grotius's book[2] "Mare liberum." The intention of Grotius was to show that the Dutch had a right of navigation and commerce with the Indies in spite of the Portuguese interdictions. He contends that the sea cannot be State property, because it cannot really be taken into possession through occupation,[3] and that

[1] See Walker, History, I. p. 161. It is obvious that this attitude of Queen Elizabeth was in no way the outcome of the conviction that really no State could claim sovereignty over a part of the Open Sea. For she herself did not think of dropping the British claims to sovereignty over the "British Seas." Her arguments against the Spanish claims were made in the interest of the growing commerce and navigation of England, and any one daring to apply the same arguments against England's claims would have incurred her royal displeasure.

[2] Its full title is: Mare liberum, seu de jure quod Batavis competit ad Indicana commercia Dissertatio.

[3] See below, § 259.

consequently the sea is by nature free from the sovereignty of any State.[1] The attack of Grotius was met by several authors of different nations. Gentilis defends Spanish and English claims in his "Advocatio Hispanica," which appeared in 1613. Likewise, in 1613 William Welwod defends the English claims in his book, "De dominio maris." John Selden wrote his "Mare Clausum sive de dominio maris" in 1618, but it was not printed until 1635. Sir John Burroughs published in 1653 his book, "The Sovereignty of the British Seas proved by Records, History, and the Municipal Laws of this Kingdom." And in defence of the claims of the Republic of Venice Paolo Sarpi published in 1676 his book "Del dominio del mare Adriatico." The most important of these books defending maritime sovereignty is that of Selden. King Charles I., by whose command Selden's "Mare Clausum" was printed in 1635, was so much impressed by it that he instructed in 1619 his ambassador in the Netherlands to complain of the audacity of Grotius and to request that the author of the "Mare liberum" should be punished.[2]

The general opposition to Grotius's bold attack on maritime sovereignty prevented his immediate victory. Too firmly established were the then recognised claims to sovereignty over certain parts of the Open Sea for the novel principle of the freedom of the sea to supplant them. Progress was made regarding one point only—namely, freedom of navigation of the sea. England had never pushed her claims so far as to attempt the prohibition of free navigation on the

[1] Grotius was by no means the first author who defended the freedom of the sea. See Nys, Les Origines du Droit International, pp. 381 and 382.

[2] See Phillimore, I. § 182.

so-called British Seas. And although Venice succeeded in keeping up her control of navigation on the Adriatic till the middle of the seventeenth century, it may be said that in the second half of that century navigation on all parts of the Open Sea was practically free for vessels of all nations. But with regard to other points claims to maritime sovereignty continued to be kept up. Thus the Netherlands had by article 4 of the Treaty of Westminster, 1674, to acknowledge that their vessels had to salute the British flag within the "British Seas" as a recognition of British maritime sovereignty.[1]

Gradual Recognition of the Freedom of the Open Sea.

§ 251. In spite of opposition, the work of Grotius was not to be undone. All prominent writers of the eighteenth century take up again the case of the freedom of the Open Sea, making a distinction between the maritime belt which is to be considered under the sway of the riparian States, and, on the other hand, the High Seas, which are under no State's sovereignty. The leading author is Bynkershoek, whose standard work, "De dominio maris," appeared in 1702. Vattel, G. F. de Martens, Azuni, and others follow the lead. And although Great Britain upheld her claim to the salute due to her flag within the "British Seas" throughout the eighteenth and at the beginning of the nineteenth century, the principle of the freedom of the Open Sea became more and more vigorous with the growth of the navies of other States; and at the end of the first quarter of the nineteenth century this principle became universally recognised in theory and practice. Great Britain silently dropped her claim to the salute due to her flag, and with it her claim to maritime

[1] See Hall, § 40, p. 152, note 1.

sovereignty, and became now a champion of the freedom of the Open Sea. When, in 1821, Russia, who was then still the owner of Alaska in North America, attempted to prohibit all foreign ships from approaching the shore of Alaska within one hundred Italian miles, Great Britain and the United States protested in the interest of the freedom of the Open Sea, and Russia dropped her claims in conventions concluded with the protesting Powers in 1824 and 1825. And when, after Russia had sold Alaska in 1867 to the United States, the latter made regulations regarding the killing of seals within Behring Sea, claiming thereby jurisdiction and control over a part of the Open Sea, a conflict arose in 1886 with Great Britain, which was settled by arbitration[1] in 1893 in favour of the freedom of the Open Sea.

II

Conception of the Open Sea

Field, article 53—Westlake, I. p. 160—Rivier, I. pp. 234–235—Pradier-Fodéré, II. No. 868—Ullmann, § 90—Stoerk in Holtzendorff, II. p. 483.

Discrimination between Open Sea and Territorial Waters.

§ 252. Open Sea or High Seas[2] is the coherent body of salt water all over the greater part of the globe, with the exception of the maritime belt and the territorial straits, gulfs, and bays, which are parts of the sea, but not parts of the Open Sea. Wherever there is a salt-water sea on the globe, it is part of the Open Sea, provided it is not isolated

[1] See below, § 284.

[2] Field defines in article 53: "The High Seas are the ocean, and all connecting arms and bays or other extensions thereof not within the territorial limits of any nation whatever."

from, but coherent with, the general body of salt water extending over the globe, and provided that the salt water approach to it is navigable and open to vessels of all nations. The enclosure of a sea by the land of one and the same State does not matter, provided such a navigable connection of salt water as is open to vessels of all nations exists between such sea and the general body of salt water, even if that navigable connection itself be part of the territory of one or more riparian States. Whereas, therefore, the Dead Sea is Turkish and the Aral Sea is Russian territory, the Sea of Marmora belongs to the Open Sea, although it is surrounded by Turkish land and although the Bosphorus and the Dardanelles are Turkish territorial straits, because these are now open to merchantmen of all nations. For the same reason the Black Sea[1] is now part of the Open Sea. On the other hand, the Sea of Azoff is not part of the Open Sea, but Russian territory, although there exists a navigable connection between it and the Black Sea. The reason is that this connection, the Strait of Kertch, is not according to the Law of Nations open to vessels of all nations, since the Sea of Azoff is less a sea than a mere gulf of the Black Sea.[2]

Clear Instances of Parts of the Open Sea.

§ 253. It is not necessary and not possible to particularise every portion of the Open Sea. It is sufficient to state instances which clearly indicate the extent of the Open Sea. To the Open Sea belong, of course, all the so-called oceans—namely, the Atlantic, Pacific, Indian, Arctic, and Antarctic. But the branches of the oceans, which go under special names, and, further, the branches of these branches,

[1] See above, § 181.

[2] So say Rivier, I. p. 237, and Martens, I. § 97: but Stoerk in Holtzendorff, II. p. 513, declares that the Sea of Azoff is part of the Open Sea.

which again go under special names, belong likewise to the Open Sea. Examples of these branches are: the North Sea, the English Channel, and the Irish Sea; the Baltic Sea, the Gulf of Bothnia, the Gulf of Finland, the Kara Sea,[1] and the White Sea; the Mediterranean and the Ligurian, Tyrrhenian, Adriatic, Ionian, Marmora, and Black Seas; the Gulf of Guinea; the Mozambique Channel; the Arabian Sea and the Red Sea; the Bay of Bengal, the China Sea, the Gulf of Siam, and the Gulf of Tonking; the Eastern Sea, the Yellow Sea, the Sea of Japan, and the Sea of Okhotsk; Behring Sea; the Gulf of Mexico and the Caribbean Sea; Baffin's Bay.

It will be remembered that it is doubtful as regards many gulfs and bays whether they belong to the Open Sea or are territorial.[2]

III

The Freedom of the Open Sea

Hall, § 75—Westlake, I. pp. 160-166—Lawrence, § 120—Twiss, I. §§ 172-173—Taylor, § 242—Wheaton, § 187—Bluntschli, §§ 304-308—Heffter, § 94—Stoerk in Holtzendorff, II. pp. 483-498—Ullmann, § 90—Bonfils, Nos. 572-577—Pradier-Fodéré, II. Nos. 874-881—Rivier, I. § 17—Calvo, I. § 346—Fiore, II. Nos. 724, 727—Martens, I. § 97—Perels, § 4—Testa, pp. 63-66—Ortolan, "Diplomatie de la mer" (1856), I. pp. 119-149—De Burgh, "Elements of Maritime International Law" (1868), pp. 1-24—Castel, "Du principe de la liberté des mers" (1900) pp. 37-80.

Meaning of the Term "Freedom of the Open Sea."

§ 254. The term "Freedom of the Open Sea" indicates the rule of the Law of Nations that the Open Sea is not and never can be under the

[1] The assertion of some Russian publicists that the Kara Sea is Russian territory is refuted by Martens, I. § 97.

[2] See above, § 191.

sovereignty of any State whatever. Since, therefore, the Open Sea is not the territory of any State, no State has regularly a right to exercise its legislation, administration, jurisdiction, or police [1] over parts of the Open Sea. Since, further, the Open Sea can never be under the sovereignty of any State, no State has a right to acquire parts of the Open Sea through occupation,[2] for, as far as the acquisition of territory is concerned, the Open Sea is what Roman Law calls *res extra commercium*. But although the Open Sea is not the territory of any State, it is nevertheless an object of the Law of Nations. The very fact alone of such a rule exempting the Open Sea from the sovereignty of any State whatever shows this. But there are other reasons. For if the Law of Nations were to content itself with the rule which excludes the Open Sea from possible State property, the consequence would be a condition of lawlessness and anarchy on the Open Sea. To obviate such lawlessness, customary International Law contains some rules which guarantee a certain legal order on the Open Sea in spite of the fact that it is not the territory of any State.

Legal Provisions for the Open Sea.

§ 255. This legal order is created through the co-operation of the Law of Nations and the Municipal Laws of such States as possess a maritime flag. The following rules of the Law of Nations are universally recognised, namely :—First, that every State which has a maritime flag must lay down rules according to

[1] See, however, above, § 190, concerning the zone for Revenue and Sanitary Laws.

[2] Following Grotius (II. c. 3, § 13) and Bynkershoek (De dominio maris, c. 3), some writers (for instance, Phillimore, I. § 203) maintain that any part of the Open Sea covered for the time by a vessel is by occupation to be considered as the temporary territory of the vessel's flag State. And some French writers go even beyond that and claim a certain zone round the respective vessel as temporary territory of the flag State. But this is an absolutely superfluous fiction. (See Stoerk in Holtzendorff, II. p. 494 ; Rivier, I. p. 238 ; Perels, pp. 37–39.)

which vessels can claim to sail under its flag, and must furnish such vessels with some official voucher authorising them to make use of its flag; secondly, that every State has a right to punish all such foreign vessels as sail under its flag without being authorised to do so; thirdly, that all vessels with their persons and goods are, whilst on the Open Sea, considered under the sway of the flag State; fourthly, that every State has a right to punish piracy on the Open Seas even if committed by foreigners, and that, with a view to the extinction of piracy, men-of-war of all nations can require all suspect vessels to show their flag.

These customary rules of International Law are, so to say, supplemented by Municipal Laws of the maritime States comprising provisions, first, regarding the conditions to be fulfilled by vessels for the purpose of being authorised to sail under their flags; secondly, regarding the details of jurisdiction over persons and goods on board vessels sailing under their flags; thirdly, concerning the order on board ship and the relations between the master, the crew, and the passengers; fourthly, concerning punishment of ships sailing without authorisation under their flags.

The fact that each maritime State has a right to legislate for its own vessels gives it a share in keeping up a certain order on the Open Sea. And such order has been turned into a more or less general order since the large maritime States have concurrently made more or less concordant laws for the conduct of their vessels on the Open Sea.

Freedom of the Open Sea and war.

§ 256. Although the Open Sea is free and not the territory of any State, it may nevertheless in its whole extent become the theatre of war, since the region of

war is not only the territories of the belligerents, but likewise the Open Sea, provided that one of the belligerents at least is a Power with a maritime flag.[1] Men-of-war of the belligerents may fight a battle in any part of the Open Sea where they meet, and they may capture all enemy merchantmen they meet on the Open Sea. And, further, the jurisdiction and police of the belligerents become through the outbreak of war in so far extended over vessels of other States, that belligerent men-of-war may now visit, search, and capture neutral merchantmen for breach of blockade, contraband, and the like.

However, certain parts of the Open Sea can become neutralised and thereby be excluded from the region of war. Thus, the Black Sea became neutralised in 1856 through article 11 of the Peace Treaty of Paris stipulating :—"La Mer Noire est neutralisée : ouverte à la marine marchande de toutes les nations, ses eaux et ses ports sont formellement et à perpétuité interdites au pavillon de guerre, soit des puissances riveraines, soit de tout autre puissance." Yet this neutralisation of the Black Sea was abolished[2] in 1871 by article 1 of the Treaty of London, and no other part of the Open Sea is at present neutralised.

Navigation and ceremonials on the Open Sea.

§ 257. The freedom of the Open Sea involves perfect freedom of navigation for vessels of all nations, whether men-of-war, other public vessels, or merchantmen. It involves, further, absence of compulsory maritime ceremonials on the Open Sea. According to the Law of Nations, no rights whatever of salute exist between vessels meeting on the Open Sea. All so-called maritime ceremonials on the Open Sea[3] are

[1] Concerning the distinction between theatre and region of war, see below, vol. II. § 70.

[2] See above, § 181.

[3] But not within the maritime belt or other territorial waters. (See above, §§ 122 and 187.)

a matter either of courtesy and usage or of special conventions and Municipal Laws of those States under whose flags vessels sail. There is in especial no right of any State to require a salute from foreign merchantmen for its men-of-war.[1]

The freedom of the Open Sea involves likewise freedom of inoffensive passage [2] through the maritime belt for merchantmen of all nations, and also for men-of-war of all nations in so far as the part concerned of the maritime belt forms a part of the highways for international traffic. Without such freedom of passage, navigation on the Open Sea by vessels of all nations would be a physical impossibility.

Claim of States to Maritime Flag.

§ 258. Since no State can exercise protection over vessels that do not sail under its flag, and since every vessel must, in the interest of the order and safety of the Open Sea, sail under the flag of a State, the question has been raised whether not only maritime States but also such States as are not riparian States of the Sea have a claim to a maritime flag. There ought to be no doubt that the freedom of the Open Sea involves a claim of every State, whether or not riparian of the Sea, to a maritime flag. At present no such non-riparian State actually has a maritime flag, and all vessels belonging to subjects of such non-riparian States sail under the flag of a maritime State. But any day might bring a change. The question as to the claim to a maritime flag on the part of a non-maritime State was discussed in Switzerland. When, in 1864, Swiss merchants in Trieste, Smyrna, Hamburg, and St. Petersburg applied to the

[1] That men-of-war can on the Open Sea ask suspicious foreign merchantmen to show their flags has nothing to do with ceremonials, but with the supervision of the Open Sea in the interest of its safety. (See below, § 266.)

[2] See above, § 188.

Swiss Bundesrath for permission to have their vessels sailing under the Swiss flag, the Bundesrath was ready to comply with the request, but the Swiss Parliament, the Bundesversammlung, refused the necessary consent. In 1889 and 1891 new applications of the same kind were made, but Switzerland again refused to have a maritime flag.[1] She had no doubt that she had a claim to such flag, but was aware of the difficulties arising from the fact that, having no seaports of her own, vessels sailing under her flag would in many points have to depend upon the goodwill of the maritime Powers.[2]

Such States as have a maritime flag as a rule have a war flag different from their commercial flag; some States, however, have one and the same flag for both their navy and their mercantile marine. But it must be mentioned that a State can by an international convention be restricted to a mercantile flag only, such State being prevented from having a navy. This is the position of Montenegro[3] according to article 30 of the Treaty of Berlin of 1878.

Rationale for the Freedom of the Open Sea.

§ 259. Grotius and many writers who follow[4] him establish two facts as the reason for the freedom of the Open Sea. They maintain, first, that a part of the Open Sea could not effectively be occupied by a Navy and could therefore not be brought under the actual sway of any State. And they assert, secondly, that Nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible, and, therefore, sufficient for all.[5] The last argument has nowadays

[1] See Salis, Schweizerisches Bundesrecht (1891), vol. I. p. 234.

[2] The question is discussed by Calvo, I. § 427, and Twiss, I. §§ 197 and 198.

[3] See above, § 127.

[4] See, for instance, Twiss, I. § 172, and Westlake, I. p. 160.

[5] See Grotius, II. c. 2, § 3.

hardly any value, especially for those who have freed themselves from the fanciful rules of the so-called Law of Nature. And the first argument is now without basis in face of the development of the modern navies, since the number of public vessels which the different States possess at present would enable many a State to occupy effectively one part or another of the Open Sea. The real reason for the freedom of the Open Sea is represented in the motive which led to the attack against maritime sovereignty, and in the purpose for which such attack was made—namely, the freedom of intercourse, and especially commerce, between the States which are severed by the Sea. The Sea being an international highway which connects distant lands, it is the common conviction that it should not be under the sway of any State whatever. It is in the interest of free intercourse [1] between the States that the principle of the freedom of the Open Sea has become universally recognised and will always be upheld.[2]

[1] See above, § 142.

[2] Connected with the reason for the freedom of the Open Sea is the merely theoretical question whether the vessels of a State could through an international treaty be prevented from navigating on the whole or on certain parts of the Open Sea. See Pradier-Fodéré, II. Nos. 881–885, where this point is exhaustively discussed.

IV

Jurisdiction on the Open Sea

Vattel, II. § 80—Hall, § 45—Westlake, I. pp. 166–176—Lawrence, § 120—Halleck, p. 438—Taylor, §§ 262–267—Walker, § 20—Wheaton, § 106—Bluntschli, §§ 317–352—Heffter, §§ 78–80—Stoerk in Holtzendorff, II. pp. 518–550—Liszt, § 26—Bonfils, Nos. 578–580, 597–613—Despagnet, Nos. 431–439—Pradier-Fodéré, V. Nos. 2376–2470—Rivier, I. § 18—Calvo, I. §§ 385–473—Fiore, II. Nos. 730–742—Martens, II. §§ 55–56—Perels, § 12—Testa, pp. 98–112—Ortolan, "Diplomatie de la mer" (1856), II. 254–326—Hall, "Foreign Powers and Jurisdiction of the British Crown" (1894), §§ 106–109.

Jurisdiction on the Open Sea mainly connected with Flag.

§ 260. Jurisdiction on the Open Sea is in the main connected with the maritime flag under which vessels sail. This is the consequence of the fact stated above [1] that a certain legal order is created on the Open Sea through the co-operation of rules of the Law of Nations with rules of the Municipal Laws of such States as possess a maritime flag. But two points must be emphasised. The one is that this jurisdiction is not jurisdiction over the Open Sea as such, but only over vessels, persons, and goods on the Open Sea. And the other is that jurisdiction on the Open Sea is, although mainly, not exclusively connected with the flag under which vessels sail, because men-of-war of all nations have, as will be seen,[2] certain powers over merchantmen of all nations. The points which must therefore be here discussed singly are—the claim of vessels to sail under a certain flag, ship-papers, the name of vessels, the connection of vessels with the territory of the flag State, the safety of traffic on the Open Sea, the powers of men-of-war over merchantmen of all nations, and, lastly, shipwreck.

[1] See above, § 255.

[2] See below, § 266.

Claim of Vessels to sail under a certain Flag.

§ 261. The Law of Nations does not include any rules regarding the claim of vessels to sail under a certain maritime flag, but imposes the duty upon every State having a maritime flag to stipulate by its own Municipal Laws the conditions to be fulfilled by those vessels which wish to sail under its flag. In the interest of order on the Open Sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the Open Sea is freedom for such vessels only as sail under the flag of a State. But a State is absolutely independent in framing the rules concerning the claim of vessels to its flag. It can in especial authorise such vessels to sail under its flag as are the property of foreign subjects; but such foreign vessels sailing under its flag fall thereby under its jurisdiction. The different States have made different rules concerning the sailing of vessels under their flags.[1] Some, as Great Britain [2] and Germany, allow only such vessels to sail under their flags as are the exclusive property of their citizens or of corporations established on their territory. Others, as Argentina, admit vessels which are the property of foreigners. Others again, as France, admit vessels which are in part the property of French citizens.

But no State can allow such vessel to sail under its flag as already sails under the flag of another State. Just as a vessel not sailing under the flag of a State, so a vessel sailing under the flags of two different States does not enjoy any protection whatever. Nor is protection enjoyed by such vessel as sails under the flag of a State which, like Switzerland, has no

[1] See Calvo, I. §§ 393–423, where the respective Municipal Laws of most countries are quoted.

[2] See section 1 of the Merchant Shipping Act, 1894 (27 & 28 Vict. c. 60).

maritime flag. Vessels belonging to persons who are subjects of States without a maritime flag must obtain authority to sail under some other State's flag, if they wish to enjoy protection on the Open Sea. And any vessel, although the property of foreigners, which sails without authority under the flag of a State, may be captured by the men-of-war of such State, prosecuted, punished, and confiscated.

Ship Papers.

§ 262. All States with a maritime flag are by the Law of Nations obliged to make private vessels sailing under their flags carry on board so-called ship papers, which serve the purpose of identification on the Open Sea. But neither the number nor the kind of such papers is prescribed by International Law, and the Municipal Laws of the different States differ much on this subject.[1] But, on the other hand, they agree as to the following papers :—

(1) An official voucher authorising the vessel to sail under its flag. This voucher consists of a Certificate of Registry, in case the flag State possesses, like Great Britain and Germany for instance, a register of its mercantile marine ; in other cases the voucher consists of a "Passport," "Sea-letter," "Sea-brief," or of some other document serving the purpose of showing the vessel's nationality.

(2) The Muster Roll. This is a list of all the members of the crew, their nationality, and the like.

(3) The Log Book. This is a full record of the voyage, with all nautical details.

(4) The Manifest of Cargo. This is a list of the cargo of a vessel, with details concerning the number and the mark of each package, the names of the shippers and the consignees, and the like.

[1] See Holland, Manual of Naval Prize Law, §§ 178–194, where the papers required by the different maritime States are enumerated.

(5) The Bills of Lading. These are duplicates of the documents which the master of the vessel hands over to the shipper of the goods at shipment.

(6) The Charter Party, if the vessel is chartered. This is the contract between the owner of the ship, who lets it wholly or in part, and the charterer, the person who hires it.

Names of Vessels.

§ 263. Every State must register the names of all private vessels sailing under its flag, and it must make them bear their names visibly, so that every vessel may be identified from a distance. No vessel must be allowed to change her name without permission and fresh registration.[1]

Territorial Quality of Vessels on the Open Sea.

§ 264. It is a customary rule of the Law of Nations that men-of-war and other public vessels of any State are, whilst on the Open Sea as well as in foreign territorial waters, in every point considered as though they were floating parts of their home States.[2] Private vessels are only considered as though they were floating portions of the flag State in so far as they remain whilst on the Open Sea in principle under the exclusive jurisdiction of the flag State. Thus the birth of a child, a will or business contract made, a crime committed on board ship, and the like, are considered as happening on the territory and therefore under the territorial supremacy of the flag[3] State. But although they appear in this respect as though they were, private vessels are in fact not floating portions of the flag State. For in time of war belligerent men-of-war can visit, search, and capture neutral private vessels on

[1] As regards Great Britain, see sect. 47 of the Merchant Shipping Act, 1894.

[2] See above, § 172, and below, §§ 447–451.

[3] Since, however, individuals abroad remain under the personal supremacy of their home State, nothing can prevent a State from legislating as regards such of its citizens as sail on the Open Sea on board a foreign vessel.

the Open Sea for breach of blockade, contraband, and the like, and in time of peace men-of-war of all nations have certain powers[1] over merchantmen of all nations.

Safety of Traffic on the Open Sea.

§ 265. No rules of the Law of Nations exist for the purpose of preventing collisions, saving lives after collisions, and the like, but every State possessing a maritime flag has legislated for the conduct on the Open Sea of vessels sailing under its flag concerning signalling, piloting, courses, collisions, and the like. Although every State can legislate on these matters independently of other States, more and more corresponding rules have been put into force by all the States during the second half of the nineteenth century, following the lead given by Great Britain through section 25 of the Merchant Shipping Act Amendment Act of 1862, the "Regulations for preventing Collisions at Sea" which accompany this Act, and, further, Sections 16 to 20 of the Merchant Shipping Act, 1873.[2] And the "Commercial Code of Signals for the Use of all Nations," published by Great Britain in 1857, has been adopted by all maritime States. In 1889 the so-called Maritime Conference took place at Washington, at which eighteen maritime States were represented and which recommended a body of rules for preventing collisions at sea to be adopted by the single States,[3] and a revision of the Code of Signals. These regulations were revised in 1890 by a British Committee appointed by the Board of Trade,[4] and,

[1] See below, § 266. The question of the territoriality of vessels is ably discussed by Hall, §§ 76–79.

[2] See 25 & 26 Vict. c. 63; 36 & 37 Vict. c. 83. The matter is now dealt with by Sections 418–421 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

[3] See Martens, N.R.G., 2nd ser. XII. p. 416.

[4] See Martens, N.R.G., 2nd ser. XXII. p. 113.

after some direct negotiations between the Governments, most maritime States have made corresponding regulations by their Municipal Laws.[1] And a new and revised edition of "The International Code of Signals" was published by the British Board of Trade, in conformity with arrangements with other maritime Powers, in 1900, and is now in general use.[2]

Powers of Men-of-war over Merchantmen of all Nations.

§ 266. Although the freedom of the Open Sea and the fact that vessels on the Open Sea remain under the jurisdiction of the flag State exclude as a rule the exercise of any State's authority over foreign vessels, there are certain exceptions in the interest of all maritime nations. These exceptions are the following:

(1) Blockade and Contraband. In time of war belligerents can blockade not only enemy ports and territorial coast waters, but also parts of the Open Sea adjoining those ports and waters, and neutral merchantmen attempting to break such a blockade can be confiscated. And, further, in time of war belligerent men-of-war can visit, search, and eventually seize neutral merchantmen for contraband, and the like.

(2) Verification of Flag. It is a universally recognised customary rule of International Law that men-of-war of all nations have, to maintain the safety of the Open Sea against piracy, the power to require suspicious private vessels on the Open Sea to show their flag.[3] But such vessels must be

[1] Latest British Regulations, 1896.

[2] The matter of collision at sea is exhaustively treated by Prien, Der Zusammenstoss von Schiffen nach den Gesetzen des Erdballs (2nd ed. 1899).

[3] So-called "Droit d'enquête" or "Vérification du pavillon." This power of men-of-war has given occasion to much dispute and discussion, but in fact nobody denies that in case of grave suspicion this power does exist. (See Twiss, I. § 193; Hall, § 81, p. 276; Fiore, II. Nos. 732–736; Perels, § 17; Taylor, § 266; Bonfils, No. 519.)

suspicious, and, since a vessel may be a pirate although she shows a flag, she may eventually be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag. It is, however, quite obvious that this power of men-of-war must not be abused, and that the home State is responsible for damages in case a man-of-war stops and visits a foreign merchantman without sufficient ground of suspicion. The right of every State to punish piracy on the Open Sea will be treated below, §§ 272–280.

(3) So-called Right of Pursuit. It is a universally recognised customary rule that men-of-war of a riparian State can pursue into the Open Sea, seize, and bring back into a port for trial any foreign merchantman that has violated the law whilst in the territorial waters of the State in question. But such pursuit into the Open Sea is permissible only if commenced while the merchantman is still in the said territorial waters or has only just escaped thence, and the pursuit must stop as soon as the merchantman passes into the maritime belt of a foreign State.[1]

(4) Abuse of Flag. It is another universally recognised rule that men-of-war of every State may seize and bring to a port of their own for punishment any foreign vessel sailing under the flag of such State without authority.[2] Accordingly, Great Britain has,

[1] See Hall, § 80.

[2] The four exceptions mentioned in the text above are based on universally recognised customary rules of the Law of Nations. It is, of course, possible for several States to enter into treaty agreements according to which their men-of-war acquire certain powers over each other's merchantmen on the Open Sea. According to such agreements, which are, however, not universal, the following additional exceptions may be enumerated:

(1) In the interest of the suppression of the slave trade, the signatory Powers of the General Act of the Brussels Conference of 1890, to which all the larger

by section 69 of the Merchant Shipping Act, 1894, enacted:—"If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right."

How Verification of Flag is effected.

§ 267. A man-of-war which meets a suspicious merchantman not showing her colours and wishes to verify the same, hoists her own flag and fires a blank cartridge. This is a signal for the other vessel to hoist her flag in reply. If she takes no notice of the signal, the man-of-war fires a shot across her bows. If the suspicious vessel, in spite of this warning, still declines to hoist her flag, the suspicion becomes so grave that the man-of-war may compel her to bring to for the purpose of visiting her and thereby verifying her nationality.

How Visit is effected.

§ 268. The intention to visit may be communicated to a merchantman either by hailing or by the "informing gun"—that is, by firing either one or two blank cartridges. If the vessel takes no notice of this communication, a shot may be fired across her bows as a signal to bring to, and, if this also has no effect, force may be resorted to. After the vessel has been brought to, either an officer is sent on board for

maritime Powers belong, have, by articles 20–65, stipulated that their men-of-war shall have the power, in certain parts of the Open Sea where slave traffic still continues, to stop every suspect vessel under 500 tons.

(2) In the interest of the Fisheries in the North Sea, special cruisers of the riparian Powers control all fishing vessels and bumboats. (See below, §§ 282 and 283.)

(3) In the interest of Transatlantic telegraph cables, men-of-war of the signatory Powers of the treaty for the protection of such cables have certain powers over merchantmen. (See below, § 287.)

the purpose of inspecting her papers, or her master is ordered to bring his ship papers for inspection on board the man-of-war. If the inspection proves the papers to be in order, a memorandum of the visit is made in the log-book, and the vessel is allowed to proceed on her course.

How Search is effected.

§ 269. Search is naturally a measure which visit must always precede. It is because the visit has given no satisfaction that search is instituted. Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being compelled to render any assistance whatever except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to the cargo. If the search proves everything to be in order, the searchers have carefully to replace everything removed, a memorandum of the search is to be made in the log-book, and the searched vessel is to be allowed to proceed on her course.

How Arrest is effected.

§ 270. Arrest of a vessel takes place either after visit and search have shown her liable thereto, or after she has committed some act which alone already justifies her seizure. Arrest is effected through the commander of the arresting man-of-war appointing one of her officers and a part of her crew to take charge of the arrested vessel. Such officer is responsible for the vessel and her cargo, which latter must be kept safe and intact. The arrested vessel, either accompanied by the arresting vessel or not, must be brought to such harbour as is determined by the cause of the arrest. Thus, neutral or enemy ships seized in time of war are always to be brought into a harbour of the flag State of the captor. And the same is the case in

time of peace, when a vessel is seized because her flag cannot be verified or because she was sailing under no flag at all. On the other hand, when a fishing vessel or a bumboat is arrested in the North Sea, she is always to be brought into a harbour of her flag State and handed over to the authorities there.[1]

Shipwreck and Distress on the Open Sea.

§ 271. It is at present the general conviction on the part of the States that goods and persons shipwrecked on the Open Sea do not thereby lose the protection of the flag State of the shipwrecked vessel. No State is allowed to recognise appropriation of abandoned vessels and other derelicts on the Open Sea by those of its subjects who take possession thereof. But every State can by its Municipal Laws enact that those of its subjects who take possession of abandoned vessels and of shipwrecked goods need not restore them to their owners without salvage, whether the act of taking possession took place on the actual Open Sea or within territorial waters and on shore of the respective State.

As regards vessels in distress on the Open Sea, some writers[2] maintain that men-of-war must render assistance even to foreign vessels in distress. But it is impossible to say that there is a customary or conventional rule of the Law of Nations in existence which imposes upon all States the duty of instructing their men-of-war to render assistance to foreign vessels in distress, although many States order by Municipal Regulations their men-of-war to render such assistance, and although morally every vessel is bound to render assistance to another vessel in distress.

[1] See below, §§ 282 and 283.
[2] See, for instance, Perels, § 25, and Fiore, II. No. 732.

V

Piracy

Hall, §§ 81-82—Westlake, I. pp. 177-182—Lawrence, § 122—Phillimore, I. §§ 356-361—Twiss, I. §§ 177 and 193—Halleck, I. pp. 444-450—Taylor, §§ 188-189—Walker, § 21—Wheaton, §§ 122-124—Bluntschli, §§ 343-350—Heffter, § 104—Gareis in Holtzendorff, II. pp. 571-581—Gareis, § 58—Liszt, § 26—Ullmann, § 93—Bonfils, Nos. 592-594—Pradier-Fodéré, V. Nos. 2491-2515—Rivier, I. pp. 248-251—Calvo, I. §§ 485-512—Fiore, I. Nos. 494-495—Perels, §§ 16-17—Testa, pp. 90-97—Ortolan, "Diplomatie de la mer" (1856), I. pp. 231-253.

Conception of Piracy.

§ 272. Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the Open Sea against another vessel with intent to plunder (*animo furandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered by this narrow definition, and yet they are practically treated as though they were cases of piracy. Thus, if the members of the crew revolt and convert the ship and the goods thereon to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Thus, secondly, if unauthorised acts of violence, such as murder of persons on board the attacked vessel or destruction of goods thereon, are committed on the Open Sea without intent to plunder, such acts are practically considered to be piratical. Under these circumstances several writers,[1] correctly, I think, oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder But no unanimity exists among

[1] Hall, § 81; Lawrence § 122; Bluntschli, § 343; Liszt, § 26; Calvo, § 485.

these very writers concerning a fit definition of piracy, and the matter is therefore very controversial. If a definition is desired which really covers all such acts as are practically treated as piratical, piracy must be defined as *every unauthorised act of violence against persons or goods committed on the Open Sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.*

Already, before a Law of Nations in the modern sense of the term was in existence, a pirate was considered an outlaw, a "hostis humani generis." According to the Law of Nations the act of piracy makes the pirate lose his national character, and thereby the protection of his home State; and his vessel, although she may formerly have possessed a claim to sail under a certain State's flag, loses such claim. Piracy is a so-called "international crime;"[1] the pirate is considered the enemy of every State, and can be brought to justice anywhere.

Private Ships as Subjects of Piracy.

§ 273. Private vessels only[2] can commit piracy. A man-of-war or other public ship, as long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag State, which has to punish the commander and to pay damages where required. But if a man-of-war or other public ship of a State revolts and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence now committed by her are indeed piratical acts. A *privateer* is not a pirate as long as her acts of violence are confined to enemy vessels, because such acts are authorised by the belligerent in whose

[1] See above, § 151.

[2] Piracy committed by the mutinous crew will be treated below, § 274.

services she is acting. And it matters not that the privateer is originally a neutral vessel.[1] But if a neutral vessel were to take Letters of Marque from both belligerents, she would be considered a pirate.

Doubtful is the case where a privateer in a civil war has received her Letters of Marque from the insurgents, and, further, the case where during a civil war men-of-war join the insurgents before the latter have been recognised as a belligerent Power. It is evident that the legitimate Government will treat such ships as pirates; but third Powers ought not to do so, as long as these vessels do not commit any act of violence against ships of these third Powers. Thus, in 1873, when an insurrection broke out in Spain, Spanish men-of-war stationed at Carthagena fell into the hands of the insurgents, and the Spanish Government proclaimed these vessels pirates, England, France, and Germany instructed the commanders of their men-of-war in the Mediterranean not to interfere as long as these insurgent vessels abstained from acts of violence against the lives and property of their subjects.[2]

It must be emphasised that the motive and the purpose of such acts of violence do not alter their piratical character, since the intent to plunder (*animus furandi*) is not required. Thus, for instance, if a private neutral vessel without Letters of Marque during war out of hatred of one of the belligerents were to attack and to sink vessels of such belligerent without plundering at all, she would nevertheless be considered as a pirate.

Mutinous Crew and Passengers as Subjects of Piracy.

§ 274. The crew or the whole or a part of the passengers who revolt on the Open Sea and convert the vessel and her goods to their own use, commit

[1] See details regarding this controversial point in Hall, § 81.

[2] See Calvo, I. §§ 497-901, and Hall, § 82.

thereby piracy, whether the vessel is private or public. But a simple act of violence alone on the part of crew or passengers does not constitute in itself the crime of piracy, at least not as far as International Law is concerned. If, for instance, the crew were to murder the master on account of his cruelty and afterwards carry on the voyage, they would be murderers, but not pirates. They are pirates only when the revolt is directed not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.

Object of Piracy.

§ 275. The object of piracy is any public or private vessel, or the persons or the goods thereon, whilst on the Open Sea. In the regular case of piracy the pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate whether he does so or kills the crew and appropriates the ship, or sinks her. On the other hand, it does not matter if the cargo is not the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention to keep him for the purpose of a high ransom, his act is piracy. It is likewise piracy if he stops a vessel for the purpose of killing a certain person only on board, although he may afterwards free vessel, crew, and cargo.

That a possible object of piracy is not only another vessel, but also the very ship on which the crew and passenger navigate, is an inference from the statements above in § 274.

Piracy how effected.

§ 276. Piracy is effected by any unauthorised act of violence, be it direct application of force or

intimidation through menace. The crew or passengers who, for the purpose of converting a vessel and her goods to their own use, force the master through intimidation to steer another course, commit piracy as well as those who murder the master and steer the vessel themselves. And a ship which, through the threat of sinking her if she were to refuse, forces another ship to deliver up her cargo or a person on board, commits piracy as well as the ship which attacks another vessel, kills her crew, and thereby gets hold of her cargo or a person on board.

The act of violence need not be consummated to constitute the crime of piracy. The mere attempt, such as attacking or even chasing only for the purpose of attack, by itself comprises piracy. On the other hand, it is doubtful whether persons cruising in armed vessels with the intention of committing piracies are liable to be treated as pirates before they have committed a single act of violence.[1]

Where Piracy can be committed.

§ 277. Piracy as an "international crime" can be committed on the Open Sea only. Piracy in territorial coast waters has quite as little to do with International Law as other robberies on the territory of a State. Some writers[2] maintain that piracy need not necessarily be committed on the Open Sea, but that it suffices that the respective acts of violence are committed by descent from the Open Sea. They maintain, therefore, that if "a body of pirates land on an island unappropriated by a civilised Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of

[1] See Stephen, Digest of the Criminal Law, article 104.

[2] Hall, § 81; Lawrence, § 122; Westlake, I. p. 177.

commonplace professional piracy." With this opinion I cannot agree. Piracy is, and always has been, a crime against the safety of traffic on the Open Sea, and therefore it cannot be committed anywhere else than on the Open Sea.

Jurisdiction over Pirates, and their Punishment.

§ 278. A pirate and his vessel lose *ipso facto* by an act of piracy their national character and the protection of their flag State. Every maritime State has by a customary rule of the Law of Nations the right to punish pirates. And the vessels of all nations, whether men-of-war, other public vessels, or merchantmen,[1] can on the Open Sea[2] chase, attack, seize, and bring the pirate home for trial and punishment by the Courts of their own country. In former times it was said to be a customary rule of International Law that pirates could at once after seizure be hanged or drowned by the captor. But this cannot now be upheld, although some writers assert that it is still the law. It would seem that the captor may execute pirates on the spot only when he is not able to bring them safely into a port for trial; but Municipal Law may, of course, interdict such execution. Concerning the punishment for piracy, the Law of Nations lays down the rule that it may be capital. But it need not be, the Municipal Law of the different States being competent to order any less severe punishment. Nor does the Law of Nations make it a duty for every maritime State to punish all pirates.[3]

[1] A few writers (Gareis in Holtzendorff, II. p. 575; Liszt, § 26; Ullmann, § 93) maintain, however, that men-of-war only have the power to seize the pirate.

[2] If a pirate is chased on the Open Sea and flees into the territorial maritime belt, the pursuers may follow, attack, and arrest the pirate there; but they must give him up to the authorities of the riparian State.

[3] Thus, according to the German Criminal Code, piracy committed by foreigners against foreign vessels cannot be punished by

That men-of-war of all nations have, with a view to insuring the safety of traffic, the power of verifying the flags of suspicious merchantmen of all nations, has already been stated above (§ 266, No. 2).

Pirata non mutat dominium.

§ 279. The question as to the property in the seized piratical vessels and the goods thereon has been the subject of much controversy. During the seventeenth century, the practice of several States conceded such vessel and goods to the captor as a premium. But during the eighteenth century the rule *pirata non mutat dominium* became more and more recognised. Nowadays the conviction would seem to be general that ship and goods have to be restored to their proprietors, and may be conceded to the captor only when the real ownership cannot be ascertained. In the first case, however, a certain percentage of the value is very often conceded to the captor as a premium and an equivalent for his expenses (so-called *droit de recousse.*[1]) Thus, according to British Law,[2] a salvage of $12\frac{1}{2}$ per cent. is to be paid to the captor of the pirate.

Piracy according to Municipal Law.

§ 280. Piracy, according to the Law of Nations, which has been defined above (§ 272) as every unauthorised act of violence against persons or goods committed on the Open Sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel, must not be confounded with the conception of piracy

German Courts (see Perels, § 17). From article 104 of Stephen's Digest of the Criminal Law, there seems to be no doubt that according to English Law all pirates are liable to be punished.

[1] See details regarding the question as to the piratical vessels and goods in Pradier-Fodéré, V Nos. 2496–2499.

[2] See section 5 of the "Act to repeal an Act of the Sixth Year of King George the Fourth, for encouraging the Capture or Destruction of Piratical Ships, &c." (13 & 14 Vict. ch. 26).

according to the different Municipal Laws.[1] The single States may confine themselves to punishing as piracy a narrower circle of acts of violence than that which the Law of Nations defines as piracy. On the other hand, they may punish their subjects as pirates for a much wider circle of acts. Thus, for instance, according to the Criminal Law of England,[2] every English subject is *inter alia* deemed to be a pirate who gives aid or comfort upon the sea to the King's enemies during a war, or who transports slaves on the High Seas.

However, since a State cannot on the Open Sea enforce its Municipal Laws against others than its own subjects, no State can treat such foreign subjects on the Open Sea as pirates as are not pirates according to the Law of Nations. Thus, when in 1858, before the abolition of slavery in America, British men-of-war molested American vessels suspected of carrying slaves, the United States objected and rightly complained.[3]

[1] See Calvo, §§ 488–492; Lawrence, § 123; Pradier-Fodéré, V. Nos. 2501 and 2502.

[2] See Stephen, Digest of the Criminal Law, articles 104–117.

[3] See Wharton, III. § 327, pp. 142 and 143; and Taylor, § 190.

VI

Fisheries in the Open Sea

Grotius, II. c. 3, § 4—Vattel, I. § 287—Hall, § 27—Lawrence, § 111—Phillimore, I. §§ 181–195—Twiss, I. § 185—Taylor, §§ 249–250—Wharton, II. §§ 300–308—Wheaton, §§ 167–171—Bluntschli, § 307—Stoerk in Holtzendorff, II. pp. 504–507—Gareis, § 62—Liszt, § 34—Ullmann, § 92—Bonfils, Nos. 581–582, 595—Pradier-Fodéré, V. Nos. 2446–2458—Rivier, I. pp. 243–245—Calvo, I. §§ 357–364—Fiore, II. Nos. 728–729—Martens, I. § 98—Perels, § 20—Hall, "Foreign Powers and Jurisdiction" (1894), § 107—David, "La pêche maritime au point de vue international" (1897).

Fisheries in the Open Sea free to all Nations.

§ 281. Whereas the fisheries in the territorial maritime belt can be reserved by the riparian State for its own subjects, it is an inference of the freedom of the Open Sea that the fisheries thereon are open [1] to vessels of all nations. Since, however, vessels

[1] Denmark silently, by fishing regulations of 1872, dropped her claim to an exclusive right of fisheries within twenty miles of the coast of Iceland. (See Hall, § 40, p. 153, note 2.) A case of a particular kind would seem to be the pearl fishery off Ceylon, which extends to a distance of twenty miles from the shore and for which regulations are in force which are enforced against foreign as well as British subjects. The claim on which these regulations are based is one "to the products of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subject of property and jurisdiction." See Hall, Foreign Powers and Jurisdiction (1894), p. 243, note 1. See also Westlake, I. p. 186, who says: "The case of the pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that it has a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under State protection, as that off the British island of Ceylon, or that in the Persian Gulf which is protected by British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character the pearl fishery will be territorial even though the shallowness of the water may allow it to be practised beyond the limit which the State in question generally fixes for the littoral sea, as in the case of Ceylon it is practised beyond the three miles limit generally recognised by Great Britain. 'Qui doutera,' says Vattel (I. § 28), 'que les pêcheries de Bahrein et de Ceylon ne puissent légitimement tomber en propriété?' And the territorial nature of the industry will carry with it, as being necessary for its protection, the territorial character of the spot."

remain whilst on the Open Sea under the jurisdiction of their flag State, every State possessing a maritime flag can legislate concerning the exercise of fisheries on the Open Sea on the part of vessels sailing under its flag. And for the same reason a State can by an international agreement renounce its fisheries on certain parts of the Open Sea, and accordingly interdict its vessels from exercising fisheries there. If certain circumstances and conditions make it advisable to restrict and regulate the fisheries on some parts of the Open Sea, the Powers are therefore able to create restrictions and regulations for that purpose through international treaties. Such treaties have been concluded—first, with regard to the fisheries in the North Sea and the suppression of the liquor trade among the fishing vessels in that Sea; secondly, with regard to the seal fisheries in the Behring Sea; thirdly, with regard to the fisheries around the Faröe Islands and Iceland.

Fisheries in the North Sea.

§ 282. For the purpose of regulating the fisheries in the North Sea, an International Conference took place at the Hague in 1881 and again in 1882, at which Great Britain, Belgium, Denmark, France, Germany, Holland, and Sweden-Norway were represented, and on May 6, 1882, the International Convention for the Regulation of the Police of the Fisheries in the North Sea outside the territorial waters[1] was signed by the representatives of all these States, Sweden-Norway excepted, to which the option of joining later on is given. This treaty contains the following stipulations:[2]—

(1) All the fishing vessels of the signatory Powers must be registered, and the registers have to be

[1] Martens, N.R.G. 2nd ser. IX. p. 556.

[2] The matter is exhaustively treated by Rykere, Le régime

exchanged between the Powers (article 5). Every vessel has to bear visibly in white colour on black ground its number, name, and the name of its harbour (articles 6–11). Every vessel must bear an official voucher of her nationality (articles 12–13).

(2) To avoid conflicts between the different fishing vessels, very minute interdictions and injunctions are provided (articles 14–25).

(3) The supervision of the fisheries by the fishing vessels of the signatory Powers is exercised by special cruisers of these Powers (article 26). With the exception of those contraventions which are specially enumerated by article 27, all these cruisers are competent to verify all contraventions committed by the fishing vessels of all the signatory Powers (article 28). For that purpose they have the right of visit, search, and arrest (article 29). But a seized fishing vessel is to be brought into a harbour of her flag State and to be handed over to the authorities there (article 30). All contraventions are to be tried by the Courts of the State to which the contravening vessels belong (article 36); but in cases of a trifling character the matter can be compromised on the spot by the commanders of the special public cruisers of the Powers (article 33).

Bumboats in the North Sea

§ 283. Connected with the regulation of the fisheries is the abolition of the liquor trade among the fishing vessels in the North Sea. Since serious quarrels and difficulties were caused through bumboats and floating grog-shops selling intoxicating

légal de la pêche maritime dans la Mer de Nord (1901). To carry out the obligations undertaken by her in the Convention for the regulation of the fisheries in the North Sea, Great Britain enacted in 1883 the "Act to carry into effect an International Convention concerning the Fisheries in the North Sea, and to amend the Laws relating to British Sea Fisheries' (46 & 47 Vict. ch. 22.)

liquors to the fishermen, an International Conference took place at the Hague in 1886, where the signatory Powers of the Hague Convention concerning the fisheries in the North Sea were represented. And on November 16, 1887, the International Convention concerning the Abolition of the Liquor Traffic among the fishermen in the North Sea was signed by the representatives of these Powers—namely, Great Britain, Belgium, Denmark, France, Germany, and Holland. This treaty[1] was, however, not ratified until 1894, and France did not ratify it at all. It contains the following stipulations:[2]—

It is interdicted to sell spirituous drinks to persons on board of fishing vessels, and these persons are prohibited from buying such drinks (article 2). Bumboats, which wish to sell provisions to fishermen, must be licensed by their flag State and must fly a white flag[3] with the letter S in black in the middle (article 3). The special cruisers of the Powers which supervise the fisheries in the North Sea are likewise competent to supervise the treaty stipulations concerning bumboats; they have the right to ask for the production of the proper licence, and eventually the right to arrest the vessel (article 7). But arrested vessels must always be brought into a harbour of their flag State, and all contraventions are to be tried by Courts of the flag State of the contravening vessel (articles 2, 7, 8).

Seal Fisheries in Behring Sea.

§ 284. In 1886 a conflict arose between Great Britain and the United States through the seizure and confiscation of British-Columbian vessels which had

[1] See Martens, N.R.G., 2nd ser. XIV. p. 540, and XXII. p. 563.

[2] The matter is treated by Guillaume in R.I., XXVI. (1894), p. 488.

[3] This flag was agreed upon in the Protocol concerning the ratification of the Convention. (See Martens, N.R.G., 2nd ser. XXII. p. 565.)

hunted seals in the Behring Sea outside the American territorial belt, infringing regulations made by the United States concerning seal fishing in that sea. Great Britain and the United States concluded an arbitration treaty[1] concerning this conflict in 1892, according to which the arbitrators should not only settle the dispute itself, but also (article 7) "determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary" in the interest of the preservation of the seals. The Arbitration Tribunal, which assembled and gave its award[2] at Paris in 1893, imposed the duty upon both parties to forbid to their subjects the killing of seals within a zone of sixty miles around the Pribiloff Islands; the killing of seals at all between May 1 and July 31 each year; seal-fishing with nets, firearms, and explosives; seal-fishing in other than specially licensed sailing vessels. Both parties in 1894 carried out this task imposed upon them.[3] The other maritime Powers were at the same time asked by the United States to submit voluntarily to the regulations made for the parties by the arbitrators, but only Italy[4] has agreed to this. Thus the matter is not yet settled by the majority of Powers, but I have no doubt that in time the United States will succeed in getting the consent of all other maritime Powers.[5]

Fisheries around the Faröe Islands and Iceland.

§ 285. For the purpose of regulating the fisheries outside territorial waters around the Faröe Islands and Iceland, Great Britain and Denmark signed

[1] See Martens, N.R.G., 2nd ser. XVIII. p. 587.

[2] See Martens, N.R.G., 2nd ser. XXI. p. 439.

[3] See the Behring Sea Award Act, 1894 (57 Vict. c. 2).

[4] See Martens, N.R.G., 2nd ser. XXII. p. 624.

[5] The award of the arbitrators of the Behring Sea dispute is discussed by Barclay in R.I., XXV. (1893), p. 417, and Engelhardt in R.I., XXVI. (1894), p. 386, and R.G., V. (1898), pp. 193 and 347.

on June 24, 1901, the Convention of London,[1] whose stipulations are for the most part literally the same as those of the International Convention for the Regulation of the Fisheries in the North Sea, concluded at the Hague in 1882.[2] The additional article of this Convention of London stipulates that any other State whose subjects fish around the Faröe Islands and Iceland may accede to it.

VII

Telegraph Cables in the Open Sea

Bonfils, No. 583—Pradier-Fodéré, V. No. 2548—Rivier, I. pp. 244 and 386—Fiore, II. No. 822—Stoerk in Holtzendorff, II. pp. 507–508—Liszt, § 29—Ullmann, § 92—Lauterbach, "Die Beschädigung unterseeischer Telegraphenkabel" (1889)—Landois, "Zur Lehre vom völkerrechtlichen Schutz der submarinen Telegraphenkabel" (1894)—Jouhannaud, "Les câbles sous-marins" (1904)—Renault in R.I., XII. (1880), p. 251, XV. (1883), p. 17.

Telegraph cables in the Open Sea admitted.

§ 286. It is a consequence of the freedom of the Open Sea that no State can prevent another from laying telegraph and telephone cables in any part of the Open Sea, whereas no State need allow this within its territorial maritime belt. As numerous submarine cables have been laid, the question as to their protection arose. Already in 1869 the United States proposed an international convention for this purpose, but the matter dropped in consequence of the outbreak of the Franco-German war. The Institute of International Law took the matter up in 1879[3] and recommended an international agreement. In 1882 France invited the Powers to an International Conference at Paris for the purpose of regulating the protection of sub-

[1] See Treaty Series, No. 5, 1903. [2] See above, § 282.
[3] See Annuaire, III. pp. 351–394.

marine cables. This conference met in October 1882, again in October 1883, and produced the "International Convention for the Protection of Submarine Telegraph Cables" which was signed at Paris on April 16, 1884.[1]

The signatory Powers are:—Great Britain, Argentina, Austria-Hungary, Belgium, Brazil, Colombia, Costa Rica, Denmark, San Domingo, France, Germany, Greece, Guatemala, Holland, Italy, Persia, Portugal, Roumania, Russia, Salvador, Servia, Spain, Sweden-Norway, Turkey, the United States, and Uruguay. Colombia and Persia did not ratify the treaty, but, on the other hand, Japan acceded to it later on.

International Protection of Submarine Telegraph Cables.

§ 287. The protection afforded to submarine telegraph cables finds its expression in the following stipulations of this international treaty:—

(1) Intentional or culpably negligent breaking or damaging of a cable in the Open Sea is to be punished by all the signatory Powers,[2] except in the case of such damage having been caused in the effort of self-preservation (article 2).

(2) Ships within sight of buoys indicating cables which are being laid or which are damaged must keep at least a quarter of a nautical mile distant (article 6).

(3) For dealing with infractions of the interdictions and injunctions of the treaty the Courts of the flag State of the infringing vessel are exclusively competent (article 8).

(4) Men-of-war of all signatory Powers have a right to stop and to verify the nationality of merchantmen of all nations which are suspected of

[1] See Martens, N.R.G., 2nd ser. XI. p. 281.

[2] See the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49).

having infringed the regulations of the treaty (article 10).

(5) All stipulations are made for the time of peace only and in no wise restrict the action of belligerents during time of war.[1]

[1] See below, vol. II. § 214.

CHAPTER III

INDIVIDUALS

I

Position of Individuals in International Law

Lawrence, § 55—Taylor, § 171—Heffter, § 58—Stoerk in Holtzendorff, II. pp. 585–592—Gareis, § 53—Liszt, § 11—Ullmann, § 96—Bonfils. Nos. 397–409—Despagnet, No. 328—Pradier-Fodéré, I. Nos. 43–49—Fiore, II. Nos. 568–712—Martens, I. §§ 85–86—Jellinek, "System der subjectiven öffentlichen Rechte" (1892), pp. 310–314—Heilborn, System, pp. 58–138—Kaufmann, "Die Rechtskraft des Internationalen Rechtes" (1899).

Importance of Individuals to the Law of Nations.

§ 288. The importance of individuals to the Law of Nations is just as great as that of territory, for the individuals are the personal basis of every State. Just as a State cannot exist without a territory, so it cannot exist without a multitude of individuals who are its subjects and who, as a body, make the people or the nation. The individuals belonging to a State can and do come in various ways in contact with foreign States in time of peace as well as of war. The Law of Nations is therefore obliged to provide certain rules regarding the individuals.

Individuals never Subjects of the Law of Nations.

§ 289. Now, what is the position of indviduals in International Law according to these rules? Since the Law of Nations is a law between States only and exclusively, States only and exclusively[1] are subjects of the Law of Nations. How is it, then, that,

[1] See above, §§ 13 and 63.

although individuals are not subjects of the Law of Nations, they have certain rights and duties in conformity with or according to International Law? Have not monarchs and other heads of States, diplomatic envoys, and even simple citizens certain rights according to the Law of Nations whilst on foreign territory? If we look more closely into these rights, it becomes quite obvious that they are not given to the favoured individuals by the Law of Nations directly. For how could International Law, which is a law between States, give rights to individuals concerning their relations to a State? What the Law of Nations really does concerning individuals, is that it imposes the duty upon all the members of the Family of Nations to grant certain privileges to such foreign heads of States and diplomatic envoys and certain rights to such foreign citizens as are on their territory. And, corresponding to this duty, every State has by the Law of Nations a right to demand that its head, its diplomatic envoys, and its simple citizens be granted certain rights by foreign States when on their territory. Foreign States granting these rights to foreign individuals do this by their Municipal Laws, and these rights are, therefore, not international rights, but rights derived from Municipal Laws. International Law is indeed the background of these rights in so far as the duty to grant them is imposed upon the single States by International Law. It is therefore quite correct to say that the individuals have these rights in conformity with or according to International Law, if it is only remembered that these rights would not exist had the single States not created them by their Municipal Law.

And the same is valid as regards special rights of

individuals in foreign countries according to special international treaties between two or more Powers. Although such treaties mostly speak of rights which individuals shall have as derived from the treaties themselves, this is nothing more than an inaccuracy of language. In fact, such treaties do not create these rights, but they impose the duty upon the contracting States to call these rights into existence by their Municipal Laws.[1]

Again, in those rare cases in which States stipulate by international treaties certain favours for individuals other than their own subjects, these individuals do not acquire any international rights out of these treaties. The latter impose the duty only upon the State whose subjects these individuals are to call those favours into existence by its Municipal Law. Thus, for example, when articles 5, 25, 35, and 44 of the Treaty of Berlin, 1878, made it a condition of the recognition of Bulgaria, Montenegro, Servia, and Roumania, that these States should not impose any religious disability upon their subjects, the latter did not thereby acquire any international rights. Another instructive example[2] is furnished by article 5 of the Peace Treaty of Prague, 1866, between Prussia and Austria, which stipulated that the northern district of Schleswig should be ceded by Prussia to Denmark in case the inhabitants should by a plebiscite vote in favour of such cession. Austria, no doubt, intended to secure by this stipulation for the inhabitants of North Schleswig the opportunity of voting in favour of their union with Denmark. But these inhabitants did not thereby acquire any inter-

[1] The whole matter is treated with great lucidity by Jellinek, System der subjectiven öffentlichen Rechte (1892), pp. 310–314, and Heilborn, System, pp. 58–138.

[2] See Heilborn, System, p. 67.

national right. Austria herself acquired only a right to insist upon Prussia granting to the inhabitants the opportunity of voting for the union with Denmark. Prussia, however, intentionally neglected her duty, Austria did not insist upon her right, and finally relinquished it by the Treaty of Vienna of 1878.[1]

Individuals Objects of the Law of Nations.

§ 290. But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations. They appear as such from many different points of view. When, for instance, the Law of Nations recognises personal supremacy of every State over its subjects at home and abroad, these individuals appear just as much objects of the Law of Nations as the territory of the States does in consequence of the recognised territorial supremacy of the States. When, secondly, the recognised territorial supremacy of every State comprises certain powers over foreign subjects within its boundaries without their home State's having a right to interfere, these individuals appear again as objects of the Law of Nations. And, thirdly, when according to the Law of Nations any State may seize and punish foreign pirates on the Open Sea, or when belligerents may seize and punish neutral blockade-runners and carriers of contraband on the Open Sea without their home State's having a right to interfere, individuals appear here too as objects of the Law of Nations.[2]

[1] It ought to be mentioned that the opinion presented in the text concerning the impossibility for individuals to be subjects of International Law, which is now mostly upheld, is vigorously opposed by Kaufmann, Die Rechtskraft des internationalen Rechtes (1899), §§ 1–4. His arguments have, however, not found favour with other authors.

[2] Westlake, Chapters, p. 2, and Lawrence (§ 55) maintain that in these cases individuals appear as *subjects* of International Law; but I cannot understand upon what

Nationality the Link between Individuals and the Law of Nations.

§ 291. If, as stated, individuals are never subjects but always objects of the Law of Nations, then nationality is the link between this law and individuals. It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations. This is a fact which has its consequences over the whole area of International Law.[1] Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, there being no State which would be competent to take their case in hand. As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever upon a State to abstain from maltreating to any extent such stateless individuals.[2] On the other hand, if individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right. It is for this reason that the question of nationality is a very important one for the Law of Nations, and that individuals enjoy benefits from this law not as human beings but as subjects of such States as are members of the Family of Nations. And so distinct is the position of subjects of these members from the position of stateless individuals and from subjects of States outside the Family of Nations, that it has been correctly characterised as a kind of international "indigenousness," a *Völkerrechts-Indigenat*.[3] Just as municipal citizenship procures for an individual the enjoyment of the benefits of the Municipal Laws, so this inter-

argument this assertion is based. The correct standpoint is taken up by Lorimer, II. p. 131, and Holland, Jurisprudence, p. 341.

[1] See below, § 294.

[2] See below, § 312.

[3] See Stoerk in Holtzendorff, II. p. 588.

national "indigenousness," which is a necessary inference from municipal citizenship, procures the enjoyment of the benefits of the Law of Nations.

The Law of Nations and the Rights of Mankind.

§ 292. Several writers[1] maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind without regarding whether an individual be stateless or not and whether he be a subject of a member-State of the Family of Nations or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising any religion one likes, the right of emigration, and the like. But such rights do not in fact enjoy any guarantee whatever from the Law of Nations,[2] and they cannot enjoy such guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this law. But there are certain facts which cannot be denied at the background of this erroneous opinion. The Law of Nations is a product of Christian civilisation and represents a legal order which binds States, chiefly Christian, into a community. It is therefore no wonder that ethical ideas which are some of them the basis of, others a development from, Christian morals, have a tendency to require the help of International Law for their realisation. When the Powers stipulated at the Berlin Congress of 1878 that the Balkan States should be recognised only under the condition that they did not impose any religious disabilities on their subjects, they lent their arm to the realisation of such an idea. Again, when the Powers after the beginning of the nineteenth

[1] Bluntschli, §§ 360-363 and 370; Martens, I. §§ 85 and 86; Fiore, I. Nos. 684-712; Bonfils, No. 397, and others.

[2] The matter is treated with great lucidity by Heilborn, System, pp. 83-138.

century agreed to several international arrangements in the interest of the abolition of the slave trade,[1] they fostered the realisation of another of these ideas. And the innumerable treaties between the different States as regards extradition of criminals, commerce, navigation, copyright, and the like, are inspired by the idea of affording ample protection to life, health, and property of individuals. Lastly, there is no doubt that, should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention[2] for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation. However, a guarantee of the so-called rights of mankind cannot be found in all these and other facts. Nor do the actual conditions of life to which certain classes of subjects are forcibly submitted within certain States show that the Law of Nations really comprises such guarantee.[3]

[1] It is incorrect to maintain that the Law of Nations has abolished slavery, but there is no doubt that the conventional Law of Nations has tried to abolish the slave trade. Three important general treaties have been concluded for that purpose during the nineteenth century since the Vienna Congress —namely, (1) the Treaty of London, 1841, between Great Britain, Austria, France, Prussia, and Russia; (2) the General Act of the Congo Conference of Berlin, 1885, whose article 9 deals with the slave trade; (3) the General Act of the anti-slavery Conference of Brussels, 1890, which is signed by Great Britain, Austria-Hungary, Belgium, the Congo Free State, Denmark, France, Germany, Holland, Italy, Luxemburg, Persia, Portugal, Russia, Spain, Sweden, Norway, the United States, Turkey, and Zanzibar.

[2] See above, § 137.

[3] The reader may think of the sad position of the Jews within the Russian Empire. The treatment of the native Jews in Roumania, although the Powers have, according to the spirit of article 44 of the Treaty of Berlin of 1878, a right of intervention, shows even more clearly that the Law of Nations does not guarantee what are called rights of mankind. (See below, p. 366, note 2.)

II

Nationality

Vattel, I. §§ 220-226—Hall, §§ 66 and 87—Westlake, I. pp. 213, 231-233—Halleck, I. p. 401—Taylor, §§ 172-178—Bluntschli, §§ 364-380—Stoerk in Holtzendorff, II. pp. 630-650—Gareis, § 54—Liszt, § 11—Ullmann, § 97—Bonfils, Nos. 433-454—Despagnet, Nos. 329-333—Pradier-Fodéré, III. No. 1645—Rivier, I. p. 303—Calvo, II. §§ 539-540—Fiore, I. Nos. 644-658, 684-717—Martens, I. §§ 85-87—Hall, "Foreign Powers and Jurisdiction" (1894), § 14—Cogordan, "La nationalité au point de vue des rapports internationaux" (2nd ed. 1896).

Conception of Nationality.

§ 293. Nationality of an individual is his quality of being a subject of a certain State and therefore its citizen. It is not for International but for Municipal Law to determine who is and who is not to be considered a subject. And therefore it matters not, as far as the Law of Nations is concerned, that Municipal Laws may distinguish between different kinds of subjects—for instance, those who enjoy full political rights and are on that account named citizens, and those who are less favoured and are on that account not named citizens. Nor does it matter that according to the Municipal Laws a person may be a subject of a part of a State, for instance of a colony, but not a subject of the mother country, provided only such person appears as a subject of the mother country as far as the latter's international relations are concerned. Thus, a person naturalised in a British Colony is for all international purposes a British subject, although he may not have the right of a British subject within the United Kingdom itself.[1] For all international purposes, all distinctions

[1] See below, § 307, and Hall, Foreign Powers and Jurisdiction, § 20, who quotes, however, a decision of the French Cour de Cassation according to which naturalisation in a British Colony

made by Municipal Laws between subjects and citizens and between different kinds of subjects have neither theoretical nor practical value, and the terms "subject" and "citizen" are, therefore, synonymously made use of in the theory and practice of International Law.

But it must be emphasised that nationality as citizenship of a certain State must not be confounded with nationality as membership of a certain nation in the sense of a race. Thus, all Englishmen, Scotchmen, and Irishmen are, despite their different nationality as regards their race, of British nationality as regards their citizenship. Thus, further, although all Polish individuals are of Polish nationality *qua* race, they have been, since the partition of Poland at the end of the eighteenth century between Russia, Austria, and Prussia, either of Russian, Austrian, or German nationality *qua* citizenship.

Function of Nationality.

§ 294. It will be remembered that nationality is the link between the individuals and the benefits of the Law of Nations.[1] This function of nationality becomes apparent with regard to individuals abroad, or property abroad of individuals who themselves are within the territory of their home State. Through one particular right and one particular duty of every State towards all other States this function of nationality becomes most conspicuous. The right is that of protection over its citizens abroad which every State holds and occasionally vigorously exercises towards other States; it will be discussed in detail below, § 319. The duty, on the other hand, is that of receiving on its territory such citizens as are not allowed to remain[2] on the territory of other States.

does not constitute a real naturalisation. But this decision is based on the Code Civil of France and has nothing to do with the Law of Nations. See also Westlake, I. pp. 231–233.

[1] See above, § 291.

[2] See below, § 326.

Since no State is obliged by the Law of Nations to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The home State of those expelled cannot refuse to receive them on the home territory, the expelling States having a claim on the home State that the latter do receive the expelled individuals.[1]

So-called *Protégés* and *de facto* Subjects.

§ 295. Although nationality alone is the regular means through which individuals can derive benefit from the Law of Nations, there are two exceptional cases in which individuals may come under the international protection of a State without these individuals being really its subjects. It happens, first, that a State undertakes by an international agreement the diplomatic protection of another State's citizens abroad, and in this case the protected foreign subjects are named "*protégés*" of the protecting States. Such agreements are either concluded for a permanency in case of a small State, as Switzerland for instance, having no diplomatic envoy in a certain foreign country where many of its subjects reside, or in time of war only, a belligerent handing over the protection of its subjects in the enemy State to a neutral State.

It happens, secondly, that a State promises diplomatic protection within the boundaries of Turkey

[1] Beyond the right of protection and the duty to receive expelled citizens at home, the powers of a State over its citizens abroad in consequence of its personal supremacy illustrate the function of nationality. (See above, § 124.) Thus, the home State can tax citizens living abroad in the interests of home finance, can request them to come home for the purpose of rendering military service, can punish them for crimes committed abroad, can categorically request them to come home for good (so-called *jus avocandi*). And no State has a right forcibly to retain foreign citizens called home by their home State, or to prevent them from paying taxes to their home State, and the like.

and other Oriental countries to certain natives in the service of its embassy or consulate. Such protected natives are called "*de facto* subjects" of the protecting State. Their case is quite an anomalous one, based on custom and treaties, and no special rules of the Law of Nations are in existence concerning such *de facto* subjects. Every State which takes such *de facto* subjects under its protection can act according to its discretion,[1] and there is no doubt that as soon as these Oriental States have reached a level of civilisation equal to that of the Western members of the Family of Nations, the whole institution of the *de facto* subjects will disappear.

Nationality and Emigration.

§ 296. As emigration comprises the voluntary removal of an individual from his home State with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, it is obvious that emigrants may well retain their nationality. Emigration is in fact entirely a matter of internal legislation of the different States. Every State can fix for itself the conditions under which emigrants lose or retain their nationality, as it can also prohibit emigration altogether, or can at any moment request those who have emigrated to return to their former home, provided the emigrants have retained their nationality of birth. And it must be specially emphasised that the Law of Nations does not and cannot grant a right of emigration to every individual, although it is frequently maintained that it is a "natural" right of every individual to emigrate from his own State.

[1] Concerning the exercise of protection in Morocco a treaty was concluded in 1880 (see Martens, N.R.G., 2nd ser. VI. p. 624), which is signed by Morocco, Great Britain, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Portugal, Spain, Sweden-Norway, and the United States.

III

Modes of Acquiring and Losing Nationality

Vattel, I. §§ 212-219—Hall, §§ 67-72—Westlake, I. pp. 213-220—Lawrence, §§ 114-115—Halleck, I. pp. 402-418—Taylor, §§ 176-183—Walker, § 19—Bluntschli, §§ 364-373—Hartmann, § 81—Heffter, § 59—Stoerk in Holtzendorff, II. pp. 592-630—Gareis, § 55—Liszt, § 11—Ullmann, §§ 98 and 100—Bonfils, Nos. 417-432—Despagnet, Nos. 334-339—Pradier-Fodéré, III. Nos. 1646-1691—Rivier, I. pp. 303-306—Calvo, II. §§ 541-654, VI. §§ 92-117—Martens, II. §§ 44-48—Foote, "Private International Jurisprudence" (3rd ed. 1904), pp. 1-52—Dicey, "Conflict of Laws" (1896), pp. 173-204—Martitz, "Das Recht der Staatsangehörigkeit im internationalen Verkehr" (1885)—Lapradelle, "De la nationalité d'origine" (1893)—Berney, "La nationalité à l'Institut de Droit International" (1897).

In 1893 the British Government addressed a circular to its representatives abroad requesting them to send in a report concerning the laws relating to nationality and naturalisation in force in the respective foreign countries. These reports have been collected and presented to Parliament. They are printed in Martens, N.R.G. 2nd ser. XIX. pp. 515-760.

Five Modes of Acquisition of Nationality.

§ 297. Although it is for Municipal Law to determine who is and who is not a subject of a State, it is nevertheless of interest for the theory of the Law of Nations to ascertain how nationality can be acquired according to the Municipal Law of the different States. The reason of the thing presents five possible modes of acquiring nationality, and, although no State is obliged to recognise all five, all States practically nevertheless do recognise them. They are birth, naturalisation, reintegration, subjugation, and cession.

Acquisition of Nationality by Birth.

§ 298. The first and chief mode of acquiring nationality is by birth, for the acquisition of nationality by another mode is exceptional only, since the vast majority of mankind acquires nationality by birth and does not change it afterwards. But no

uniform rules exist according to the Municipal Law of the different States concerning this matter. Some States, as Germany and Austria, have adopted the rule that descent alone is the decisive factor,[1] so that a child born of their subjects becomes *ipso facto* by birth their subject likewise, be the child born at home or abroad. According to this rule, illegitimate children acquire the nationality of their mother. Other States, such as Argentina, have adopted the rule that the territory on which birth occurs is exclusively the decisive factor.[2] According to this rule every child born on the territory of such State, whether the parents be citizens or foreigners, becomes a subject of such State, whereas a child born abroad is foreign, although the parents may be subjects. Again, other States, as Great Britain [3] and the United States, have adopted a mixed principle, since, according to their Municipal Law, not only children of their subjects born at home or abroad become their subjects, but also such children of foreign parents as are born on their territory.

Acquisition of Nationality through Naturalisation.

§ 299. The most important mode of acquiring nationality besides birth is that of naturalisation in the wider sense of the term. Through naturalisation a person who is a foreigner by birth acquires the nationality of the naturalising State. According to the Municipal Law of the different States naturalisation may take place through six different acts—namely, marriage, legitimation, option, acquisition of domicile, appointment as Government official, grant on application. Thus, according to the Municipal Law of most States, a foreign female person marrying

[1] *Jus sanguinis.*
[2] *Jus soli.*
[3] See details concerning British law on this point in Hall, Foreign Powers and Jurisdiction (1894), § 14.

a subject of such State becomes thereby *ipso facto* naturalised. Thus, further, according to the Municipal Law of several States, an illegitimate child born of a foreign mother, and therefore a foreigner itself, becomes *ipso facto* naturalised through the father marrying the mother and thereby legitimating the child.[1] Thus, thirdly, according to the Municipal Law of some States, which declare children of foreign parents born on their territory to be foreigners, such children, if they make, after having come of age, a declaration that they intend to be subjects of the country of their birth, become *ipso facto* by such option naturalised. Again, fourthly, some States, such as Venezuela, let a foreigner become naturalised *ipso facto* by his taking his domicile[2] on their territory. Some States, fifthly, let a foreigner become naturalised *ipso facto* on appointment as a Government official. And, lastly, in all States naturalisation may be procured through a direct act on the part of the State granting nationality to a foreigner who has applied for it. This last kind of naturalisation is naturalisation in the narrower sense of the term; it is the most important for the Law of Nations, and, whenever one speaks of naturalisation pure and simple, such naturalisation through direct grant on application is meant; it will be discussed in detail below, §§ 303–307.

Acquisition of Nationality through Redintegration.

§ 300. The third mode of acquiring nationality is that by so-called redintegration or resumption. Such individuals as have been natural-born subjects of a State, but have lost their original nationality through

[1] British law has not adopted this rule.

[2] It is doubtful (see Hall, § 64) whether the home State of such individuals naturalised against their will must submit to this *ipso facto* naturalisation. See above, § 125, where the rule has been stated that in consideration of the personal supremacy of the home State over its citizens abroad no State can naturalise foreigners against their will.

naturalisation abroad or for some other cause, may recover their original nationality on their return home. One speaks in this case of redintegration or resumption in contradistinction to naturalisation, the favoured person being redintegrated and resumed into his original nationality. Thus, according to Section 10 of the Naturalisation Act,[1] 1870, a widow being a natural-born British subject, who has lost her British nationality through marriage with a foreigner, may at any time during her widowhood obtain a certificate of readmission to British nationality. And according to Section 8 of the same Act, a British-born individual who has lost his British nationality through being naturalised abroad, may, if he returns home, obtain a certificate of readmission to British nationality.

Acquisition of Nationality through Subjugation and Cession.

§ 301. The fourth and fifth modes of acquiring nationality are by subjugation after conquest and by cession of territory, the inhabitants of the subjugated as well as of the ceded territory acquiring *ipso facto* by the subjugation or cession the nationality of the State which acquires the territory. These modes of acquisition of nationality are modes settled by the customary Law of Nations; it will be remembered that details concerning this matter have been given above, §§ 219 and 240.

Seven modes of losing Nationality.

§ 302. Although it is left in the discretion of the different States to determine the grounds on which individuals lose their nationality, it is nevertheless of interest for the theory of the Law of Nations to take notice of these grounds. Seven modes of losing nationality must be stated to exist according to the reason of the thing, although all seven are by no means recognised by all the States. These modes

[1] 33 Vict. c. 14.

are :—Release, deprivation, long-continued emigration, option, naturalisation abroad, subjugation, and cession.

(1) Release. Some States, as Germany, give their citizens the right to ask to be released from their nationality. Such release, if granted, denationalises the released individual.

(2) Deprivation. According to the Municipal Law of some States a citizen may lose his nationality through deprivation as a punishment. Thus, a Russian loses his nationality as a punishment on entry into foreign military service or on emigration without permission of the Government.

(3) Long-continued emigration. Some States have legislated that such citizens as have emigrated and stayed abroad for some length of time lose their nationality. Thus, a German ceases to be a German subject through the mere fact that he has emigrated and stayed abroad for ten years without having undertaken the necessary step for the purpose of retaining his nationality.

(4) Option. Some States, as Great Britain, which declare a child born of foreign parents on their territory to be their natural-born subject, although it becomes at the same time according to the Municipal Law of the home State of the parents a subject of such State, give the right to such child to make, after coming of age, a declaration that it desires to cease to be a citizen. Such declaration of alienage creates *ipso facto* the loss of nationality.

(5) Naturalisation abroad. Many States, such as Great Britain in contradistinction to Germany, let the nationality of their subjects extinguish *ipso facto* by their naturalisation abroad, be it through marriage, grant on application, or otherwise. States

which act otherwise do not object to their citizens acquiring another nationality besides that which they already possess.

(6) Subjugation and cession. It is a universally recognised customary rule of the Law of Nations that the inhabitants of subjugated as well as ceded territory lose their nationality and acquire that of the State which annexes the territory.[1]

IV

Naturalisation in Especial

Vattel, I. § 214—Hall, §§ 71–71*—Westlake, § I. pp. 225–230—Lawrence, §§ 115–116—Phillimore, I. §§ 325–332—Halleck, I. pp. 403–410—Taylor, §§ 181–182—Walker, § 19—Wharton, II. §§ 173–183—Wheaton, § 85—Bluntschli, §§ 371–372—Ullmann, §§ 98–99—Pradier-Fodéré, III. Nos. 1656–1659—Calvo, II. §§ 581–646—Martens, II. §§ 47–48—Stoicesco, "Étude sur la naturalisation" (1875)—Folleville, "Traité de la naturalisation" (1880)—Delécaille, "De la naturalisation" (1893)—Hart, in the "Journal of the Society of Comparative Legislation," new series, vol. II. (1900), pp. 11–26.

Conception and Importance of Naturalisation.

§ 303. Naturalisation in the narrower sense of the term—in contradistinction to naturalisation *ipso facto* through marriage, legitimation, option, domicile, and Government office (see above, § 399)—must be defined as reception of a foreigner into the citizenship of a State through a formal act on application of the favoured individual. International Law does not provide any such rules for such reception, but it recognises the natural competence of every State as a Sovereign to increase its population through naturali-

[1] See above, § 301, concerning the option sometimes given to inhabitants of ceded territory to retain their former nationality; see above, § 219.

sation, although a State might by its Municipal Law be prevented from making use of this natural competence.[1] In spite, however, of the fact that naturalisation is a domestic affair of the different States, it is nevertheless of special importance to the theory and practice of the Law of Nations. This is the case because naturalisation is effected through a special grant of the naturalising State, and regularly involves either a change or a multiplication of nationality, facts which can be and have been the source of grave international conflicts. In the face of the fact that millions of citizens emigrate every year from their home countries for good with the intention of settling in foreign countries, where the majority of them becomes sooner or later naturalised, the international importance of naturalisation cannot be denied.

Object of Naturalisation.

§ 304. The object of naturalisation is always a foreigner. Some States will naturalise such foreigners only as are stateless because they never have been citizens of another State or because they have renounced or have been released from or deprived of the citizenship of their home State. But other States, as Great Britain, naturalise also such foreigners as are and remain subjects of their home State. Most States naturalise such person only as has taken his domicile in their country, has been residing there for some length of time, and intends to remain in their country for good. And, according to the Municipal Law of many States, naturalisation of a married individual includes that of his wife and children under age. But, although every foreigner may be naturalised, no foreigner has, according to the Municipal Law of most States, a claim to become naturalised, naturalisa-

[1] But there is, as far as I know, no civilised State in existence which abstains altogether from naturalising foreigners.

tion being a matter of discretion of the Government, which can refuse it without giving any reasons.

Conditions of Naturalisation.

§ 305. If granted, naturalisation makes a foreigner a citizen. But it is left to the discretion of the naturalising State to grant naturalisation under any conditions it likes. Thus, for example, Great Britain grants naturalisation on the sole condition that the naturalised foreigner shall not be deemed to be a British subject when within the limits of the foreign State of which he has been a subject previously to his naturalisation, unless at the time of naturalisation he has ceased to be a subject of that State. And it must be specially mentioned that naturalisation need not give a foreigner absolutely the same rights as are possessed by natural-born citizens. Thus it is well known that a naturalised subject of the United States of America can never be elected President.[1]

Effect of Naturalisation upon previous Citizenship.

§ 306. Since the Law of Nations does not comprise any rules concerning naturalisation, the effect of naturalisation upon previous citizenship is exclusively a matter of the Municipal Law of the States concerned. Some States, as Great Britain,[2] have legislated that one of their subjects becoming naturalised abroad loses thereby his previous nationality; but other States, as Germany, have not done this. Further, some States, as Great Britain again, deny every effect to the naturalisation granted by them to a foreigner whilst he is staying on the territory of the State whose subject he was previously to his

[1] A foreigner naturalised in Great Britain by Letters of Denization does not acquire the same rights as a natural-born British subject. See Hall, Foreign Powers and Jurisdiction, (1894) § 22.

[2] Formerly Great Britain upheld the rule *nemo potest exuere patriam*, but Section 6 of the Naturalisation Act, 1870, does away with that rule.

naturalisation, unless at the time of naturalisation he was no longer a subject of such State. But other States do not make this provision. Be that as it may, there can be no doubt that a person who is naturalised abroad and returns for a time or for good into the country of his origin, can be held responsible [1] for all acts done there at the time before his naturalisation abroad.

Naturalisation in Great Britain.

§ 307. The present law of Great Britain concerning Naturalisation is mainly contained in the Naturalisation Acts of 1870, 1874, and 1895.[2] Foreigners may on their application become naturalised by a certificate of naturalisation in case they have resided in the United Kingdom or have been in the service of the British Crown for a term of not less than five years, and in case they have the intention to go on residing within the United Kingdom or serving under the Crown. But naturalisation may be refused without giving a reason therefor (section 7). British possessions may legislate on their own account concerning naturalisation (section 16), and persons so naturalised are for all international purposes [3] British subjects. Where the Crown enters into a convention with a foreign State to the effect that the subjects of such State who have been naturalised in Great Britain may divest themselves of their status as British subjects, such naturalised British subjects can through a declaration of alienage shake off the acquired British nationality (section 3). Naturalisation of the husband includes that of his

[1] Many instructive cases concerning this matter are reported by Wharton, II. §§ 180 and 181. See also Hall, § 71, where details concerning the practice of many States are given with regard to their subjects naturalised abroad.

[2] 33 Vict. c. 14; 35 and 36 Vict. c. 39; 58 & 59 Vict. c. 43.

[3] See Hall, Foreign Powers and Jurisdiction, §§ 20 and 21, especially concerning naturalisation in India.

wife, and naturalisation of the father, or mother in case she is a widow, includes naturalisation of such children as have during infancy become resident in the United Kingdom at the time of their father's or mother's naturalisation (section 10). Neither the case of children who are not resident within the United Kingdom or not resident with their father in the service of the Crown abroad at the time of the naturalisation of their father or widowed mother, nor the case of children born abroad after the naturalisation of the father is mentioned in the Naturalisation Act. It is, therefore, to be taken for granted that such children are not[1] British subjects, except children born of a naturalised father abroad in the service of the Crown.[2]

Not to be confounded with naturalisation proper is naturalisation through *denization* by means of Letters Patent under the Great Seal. This way of making a foreigner a British subject is based on a very ancient practice [3] which has not yet become obsolete. Such denization requires no previous residence within the United Kingdom. "A person may be made a denizen without ever having set foot upon British soil. There have been, and from time to time there no doubt will be, persons of foreign nationality to whom it is wished to entrust functions which can only be legally exercised by British subjects. In such instances, the condition of five years' residence in the United Kingdom would generally be prohibitory. The difficulty can be avoided by the issue of Letters of Denization; and it is believed that on one or two occasions letters have in fact been issued with

[1] See Hall, Foreign Powers and Jurisdiction, § 19.

[2] See Naturalisation Act, 1895 (58 & 59 Vict. c. 43).

[3] See Hall, Foreign Powers and Jurisdiction, § 22.



the view of enabling persons of foreign nationality to exercise British consular jurisdiction in the East." (Hall.)

V

Double and Absent Nationality

Hall, § 71—Westlake, I. pp. 221-225—Lawrence, § 116—Halleck, I. pp. 410-413—Taylor, § 183—Wheaton, § 85 (Dana's note)—Bluntschli, §§ 373-374—Hartmann, § 82—Heffter, § 59—Stoerk in Holtzendorff, II. pp. 650-655—Ullmann, § 98—Bonfils, No. 422—Pradier-Fodéré, III. Nos. 1660-1665—Rivier, I. pp. 304-306—Calvo, II. §§ 647-654—Martens, II. § 46.

Possibility of Double and Absent Nationality.

§ 308. The Law of Nations having no rule concerning acquisition and loss of nationality beyond this, that nationality is lost and acquired through subjugation and cession, and, on the other hand, the Municipal Laws of the different States differing in many points concerning this matter, the necessary consequence is that an individual may own two different nationalities as easily as none at all. The points to be discussed here are therefore: how double nationality occurs, the position of individuals with double nationality, how absent nationality occurs, the position of individuals destitute of nationality, and, lastly, means of redress against difficulties arising from double and absent nationality.

It must, however, be specially mentioned that the Law of Nations is concerned with such cases only of double and absent nationality as are the consequences of conflicting Municipal Laws of several absolutely different States. Such cases as are the consequence of the Municipal Laws of a Federal State or of a State which, as Great Britain, is an Incorporate Union, fall outside the scope of the Law of Nations.

Thus the fact that, according to the law of Germany, a German can be at the same time a subject of several member-States of the German Empire, or can be a subject of this Empire without being a subject of one of its member-States, does as little concern the Law of Nations as the fact that an individual can be a subject of a British Colonial State without at the same time being a subject of the United Kingdom. For internationally such individuals appear as subjects of such Federal State or Incorporate Union, whatever their position may be inside these Unions of States.

How Double Nationality occurs.

§ 309. An individual may own double nationality knowingly or unknowingly, and with or without intention. And double nationality may be produced by every mode of acquiring nationality. Even birth can vest a child with double nationality. Thus, every child born in Great Britain of German parents acquires at the same time British and German nationality, for such child is British according to British, and German according to German Municipal Law. Double nationality can likewise be the result of marriage. Thus, a Venezuelan woman marrying an Englishman acquires according to British law British nationality, but according to Venezuelan law she does not lose her Venezuelan nationality. Legitimation of illegitimate children can produce the same effect. Thus, an illegitimate child of a German born in England of an English mother is a British subject according to British and German law, but if after the birth of the child the father marries the mother and remains a resident in England, he thereby legitimates the child according to German law, and such child acquires thereby German nationality without losing its British nationality, although the mother

does lose her British nationality.[1] Again, double nationality may be the result of option. Thus, a child born in France of German parents acquires German nationality, but if, after having come of age, it acquires French nationality by option through making the declaration necessary according to French Municipal Law, it does not thereby, according to German Municipal Law, lose its German nationality. It is not necessary to give examples of double nationality caused by taking domicile abroad, accepting foreign Government office, and redintegration, and it suffices merely to draw attention to the fact that naturalisation in the narrower sense of the term is frequently a cause of double nationality, since individuals may apply for and receive naturalisation in a State without thereby losing the nationality of their home State.

Position of Individuals with Double Nationality.

§ 310. Individuals owning double nationality bear in the language of diplomatists the name *sujets mixtes*. The position of such "mixed subjects" is awkward on account of the fact that two different States claim them as subjects, and therefore their allegiance. In case a serious dispute arises between these two States which leads to war, an irreconcilable conflict of duties is created for these unfortunate individuals. It is all very well to say that such conflict is a personal matter which concerns neither the Law of Nations nor the two States in dispute. As far as an individual has, through naturalisation, option, and the like, acquired his double nationality, one may say that he has placed himself in that awkward position by intentionally and knowingly acquiring a second without being released from his original

[1] This is the consequence of Section 10, Nos. 1 and 3, of the Naturalisation Act, 1870.

nationality. But those who are natural-born *sujets mixtes* in most cases do not know thereof before they have to face the conflict, and their difficult position is not their own fault.

Be that as it may, there is no doubt that each of the States which claim such an individual as subject is internationally competent to do this, although they cannot claim him against one another, since each of them correctly maintains that he is its subject.[1] But against third States each of them appears as his Sovereign, and it is therefore possible that each of them can exercise its right of protection over him within third States.

How Absent Nationality occurs.

§ 311. An individual may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own. Even by birth a person may be stateless. Thus, an illegitimate child born in Germany of an English mother is actually destitute of nationality because according to German law it does not acquire German, and according to British law it does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are them-

[1] I cannot agree with the statement in its generality made by Westlake, I. p. 221 :—"If, for instance, a man claimed as a national both by the United Kingdom and by another country should contract in the latter a marriage permitted by its laws to its subjects, an English Court would have to accept him as a married man." If this were correct, the marriage of a German who, without having given up his German citizenship, has become naturalised in Great Britain and has afterwards married his niece in Germany, would have to be recognised as legal by the English Courts. The correct solution seems to me to be that such marriage is legal in Germany, but not legal in England, because British law does not admit the marriage between uncle and niece. The case is different when a German who married his niece in Germany becomes afterwards naturalised in England; in this case English Courts would have to recognise the marriage as legal because German law does not object to a marriage between uncle and niece, and because the marriage was concluded before the man became a British subject.

selves, according to German law, stateless. But statelessness may take place after birth. All individuals who have lost their original nationality without having acquired another are in fact destitute of nationality.

Position of Individuals destitute of Nationality.

§ 312. That stateless individuals are in so far objects of the Law of Nations as they fall under the territorial supremacy of the State on whose territory they live there is no doubt whatever. But since they do not own a nationality, the link[1] by which they could derive benefits from International Law is missing, and thus they lack any protection whatever as far as this law is concerned. The position of such individuals destitute of nationality may be compared to vessels on the Open Sea not sailing under the flag of a State, which likewise do not enjoy any protection whatever. In practice, stateless individuals are in most States treated more or less as though they were subjects of foreign States, but as a point of international legality there is no restriction whatever upon a State's maltreating them to any extent.[2]

Redress against Difficulties arising from Double and Absent Nationality.

§ 313. Double as well as absent nationality of individuals has from time to time created many difficulties for the States concerned. As regards the remedy for such difficulties, it is comparatively easy to meet those created by absent nationality. If the number of stateless individuals increases much within a certain State, the latter can require them to

[1] See above, § 291.

[2] The position of the Jews in Roumania furnishes a sad example. According to Municipal Law they are, with a few exceptions, considered as foreigners for the purpose of avoiding the consequences of article 44 of the Treaty of Berlin, 1878, according to which no religious disabilities may be imposed by Roumania upon her subjects. But as these Jews are not subjects of any other State, Roumania compels them to render military service, and actually treats them in every way according to discretion without any foreign State being able to exercise a right of protection over them. See Rey in R.G., X. (1903), pp. 460–526, and above, p. 347, note 3.

apply for naturalisation or to leave the country; it can even naturalise them by Municipal Law against their will, as no other State will and has a right to interfere, and as, further, the very fact of the existence of individuals destitute of nationality is a blemish in Municipal as well as in International Law. Much more difficult is it, however, to find, within the limits of the present rules of the Law of Nations, means of redress against conflicts arising from double nationality. Very grave disputes indeed have occasionally occurred between States on account of individuals who were claimed as subjects by both sides. Thus, in 1812, a time when England still kept to her old rule that no natural-born English subject could lose his nationality, the United States went to war with England because the latter impressed Englishmen naturalised in America from on board American merchantmen, claiming the right to do so, as according to her law these men were still English citizens. Thus, further, Prussia frequently had during the sixties of the last century disputes with the United States on account of Prussian individuals who, without having rendered military service at home, had emigrated to America to become there naturalised and had afterwards returned to Prussia.[1] Again,

[1] The case of Martin Koszta ought here to be mentioned, details of which are reported by Wharton, II. § 175, and Hall, § 72. Koszta was a Hungarian subject who took part in the revolutionary movement of 1848, escaped to the United States, and intended to become naturalised there. After remaining nearly two years in the United States, but before he was really naturalised, he visited Turkey, and while at Smyrna he was seized by Austrian officials and taken on board an Austrian man-of-war with the intention to bring him to Austria, to be there punished for his part in the revolution of 1848. The American Consul demanded his release, but Austria maintained that she had a right to arrest Koszta according to treaties between her and Turkey. Thereupon the American man-of-war "Saint Louis" threatened to attack the Austrian man-of-war in case she would not give up her prisoner, and an arrangement was made that Koszta should be delivered into

during the time of the revolutionary movements in Ireland in the last century before the Naturalisation Act of 1870 was passed, disputes arose between Great Britain and the United States on account of such Irishmen as took part in these revolutionary movements after having become naturalised in the United States.[1] It would seem that the only way in which all the difficulties arising from double and absent nationality could really be done away with is for all the Powers to agree upon an international convention according to which they undertake the obligation to enact by their Municipal Law such corresponding rules regarding acquisition and loss of nationality as make the very occurrence of double and absent nationality impossible.[2]

the custody of the French Consul at Smyrna until the matter was settled between the United States and Austrian Governments. Finally, Austria consented to Koszta's being brought back to America. Although Koszta was not yet naturalised, the United States claimed a right of protection over him, since he had taken his domicile on her territory with the intention to become there naturalised in due time.

[1] The United States have, through the so-called "Bancroft Treaties," attempted to overcome conflicts arising out of double nationality. The first of these treaties was concluded in 1868 with the North German Confederation, the precursor of the present German Empire, and signed on behalf of the United States by her Minister in Berlin, George Bancroft. (See Wharton, II. §§ 149 and 179.) In the same and the following year treaties of the same kind were concluded with many other States. A treaty of another kind, but with the same object, was concluded between the United States and Great Britain on May 13, 1870. (See Martens, N.R.G., XX. p. 524.) All these treaties stipulate that naturalisation in one of the contracting States shall be recognised by the other, whether the naturalised individual has or has not previously been released from his original citizenship. And they further stipulate that such naturalised individuals, in case they return after naturalisation into their former home State and take their residence there for some years, either *ipso facto* become again subjects of their former home State and cease to be naturalised abroad (as the Bancroft Treaties), or can be reinstated in their former citizenship, and cease thereby to be naturalised abroad (as the treaty with Great Britain).

[2] The Institute of International Law has studied the matter, and formulated at its meeting in Venice in 1896 six rules, which, if adopted on the part of the different States, would do away with many of the difficulties. (See Annuaire, XV. p. 270.)

VI

Reception of Foreigners and Right of Asylum

Vattel, II. § 100—Hall, §§ 63–64—Westlake, I. pp. 208–210—Lawrence, §§ 117–118—Phillimore, I. §§ 365–370—Twiss, I. § 238—Halleck, I. pp. 452–454—Taylor, § 186—Walker, § 19—Wharton, II. § 206—Wheaton, § 115, and Dana's Note—Bluntschli, §§ 381–398—Hartmann, §§ 84–85, 89—Heffter, §§ 61–63—Stoerk in Holtzendorff, II. pp. 637–650—Gareis, § 57—Liszt, § 25—Ullmann, §§ 102–103—Bonfils, Nos. 441–446—Despagnet, Nos. 340–362—Rivier, I. pp. 307–309—Calvo, II. §§ 701–706, VI. 119—Martens, II. § 46.

No Obligation to admit Foreigners.

§ 314. Many writers[1] maintain that every member of the Family of Nations is bound by International Law to admit all foreigners into its territory for all lawful purposes, although they agree that every State could exclude certain classes of foreigners. This opinion is generally held by those who assert that there is a fundamental right of intercourse between States. It will be remembered[2] that no such fundamental right exists, but that intercourse is a characteristic of the position of the States within the Family of Nations and therefore a presupposition of the international personality of every State. A State, therefore, cannot exclude foreigners altogether from its territory without violating the spirit of the Law of Nations and endangering its very membership of the Family of Nations. But no State actually does exclude foreigners altogether. The question is only whether an international legal duty can be said to exist for every State to admit all unobjectionable foreigners to all parts of its territory. And it is this duty which must be denied as far as the customary Law of Nations is concerned. It must be emphasised that, apart from general conventional arrangements,

[1] See, for instance, Bluntschli, § 381, and Liszt, § 25.
[2] See above, § 141.

as, for instance, those concerning navigation on international rivers, and apart from special treaties of commerce, friendship, and the like, no State can claim the right for its subjects to enter into and reside on the territory of a foreign State. The reception of foreigners is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude foreigners from the whole or any part of its territory. And it is only an inference from this competence that the United States and other States [1] have made special laws according to which paupers and criminals, as well as diseased and other objectionable aliens, are prevented from entering their territory. Every State is and must remain master in its own house, and such mastership is of especial importance with regard to the admittance of foreigners. Of course, if a State excluded all subjects of one State only, this would constitute an unfriendly act, against which retorsion would be admissible; but it cannot be denied that a State is competent to do this, although in practice such wholesale exclusion will never happen. Hundreds of treaties of commerce and friendship exist between the members of the Family of Nations according to which they are obliged to receive each other's unobjectionable subjects, and thus practically the matter is settled, although in strict law every State is competent to exclude foreigners from its territory.[2]

Reception of Foreigners under conditions.

§ 315. It is obvious that, if a State need not receive foreigners at all, it can, on the other hand,

[1] The Aliens Bill brought in by the British Government in 1904 has not been passed by Parliament, but a similar bill will again be introduced in 1905.

[2] The Institute of International Law has studied the matter, and adopted at its meeting at Geneva in 1892 (see Annuaire, XII. p. 219) a body of forty-one articles concerning the admission and expulsion of foreigners; articles 6–13 deal with the admittance of foreigners.

receive them under certain conditions only. Thus, for example, Russia does not admit foreigners without passports, and if the foreigner adheres to the Jewish faith he has to submit to a number of special restrictions. Thus, further, during the time Napoleon III. ruled in France, every foreigner entering French territory from the sea or from neighbouring land was admitted only after having stated his name, nationality, and the place he intended to go to. Some States, as Switzerland, make a distinction between such foreigners as intend to settle down in the country and such as intend to travel only in the country; no foreigner is allowed to settle in the country without having asked and received a special authorisation on the part of the Government, whereas the country is unconditionally open to all mere travelling foreigners.

So-called Right of Asylum.

§ 316. The fact that every State exercises territorial supremacy over all persons on its territory, whether they are its subjects or foreigners, excludes the prosecution of foreigners thereon by foreign States. Thus, a foreign State is, provisionally at least, an asylum for every individual who, being prosecuted at home, crosses its frontier. In the absence of extradition treaties stipulating the contrary, no State is by International Law obliged to refuse admittance into its territory to such a fugitive or, in case he has been admitted, to expel him or deliver him up to the prosecuting State. On the contrary, States have always upheld their competence to grant asylum if they choose to do so. Now the so-called right of asylum is certainly not a right of the foreigner to demand that the State into whose territory he has entered with the intention of escaping prosecution from some other State should grant protection and

asylum. For such State need not grant them. The so-called right of asylum is nothing but the competence mentioned above of every State, and inferred from its territorial supremacy, to allow a prosecuted foreigner to enter and to remain on its territory under its protection, and to grant thereby an asylum to him. Such fugitive foreigner enjoys the hospitality of the State which grants him asylum; but it might be necessary to place him under surveillance, or even to intern him at some place in the interest of the State which is prosecuting him. For it is the duty of every State to prevent individuals living on its territory from endangering the safety of another State. And if a State grants asylum to a prosecuted foreigner, this duty becomes of special importance.

VII

Position of Foreigners after Reception

Vattel, I. § 213, II. §§ 101–115—Hall, §§ 63 and 87—Westlake, I. pp. 211–212, 313–316—Lawrence, §§ 117–118—Phillimore, I. §§ 332–339—Twiss, I. § 163—Taylor, §§ 173, 187, 201–203—Walker, § 19—Wharton, II. §§ 201–205—Wheaton, §§ 77–82—Bluntschli, §§ 385–393—Hartmann, §§ 84–85—Heffter, § 62—Stoerk in Holtzendorff, II. pp. 637–650—Gareis, § 57—Liszt, § 25—Ullmann, § 102—Bonfils, Nos. 447–454—Despagnet, Nos. 340–362—Rivier, I. pp. 309–311—Calvo, II. §§ 701–706—Martens, II. § 46.

Foreigners subjected to Territorial Supremacy.

§ 317. With his entrance into a State, a foreigner, unless he belongs to the class of those who enjoy so-called exterritoriality, falls at once under such State's territorial supremacy, although he remains at the same time under the personal supremacy of his home State. Such foreigner is therefore under the jurisdiction of the State in which he stays, and is responsible to such State for all acts he commits on

its territory. He is further subjected to all administrative arrangements of such State which concern the very locality where the foreigner is. If in consequence of a public calamity, such as the outbreak of a fire or an infectious disease, certain administrative restrictions are enforced, they can be enforced against all foreigners as well as against citizens. But apart from jurisdiction and mere local administrative arrangements, both of which concern all foreigners alike, a distinction must be made between such foreigners as are merely travelling and stay, therefore, only temporarily on the territory, and such as take their residence there either for good or for some length of time. A State has wider power over foreigners of the latter kind; it can make them pay rates and taxes, and can even compel them in case of need, under the same conditions as citizens, to serve in the local police and the local fire brigade for the purpose of maintaining public order and safety. On the other hand, a foreigner does not fall under the personal supremacy of the local State; therefore he cannot be made to serve in its army or navy, and cannot, like a citizen, be treated according to discretion.

Foreigners in Eastern Countries.

§ 318. The rule that foreigners fall under the territorial supremacy of the State they are in, finds an exception in Turkey and, further, in such other Eastern States, like China, as are, in consequence of their deficient civilisation, only for some parts members of the Family of Nations. Foreigners who are subjects of Christian States and enter into the territory of such Eastern States, remain wholly under the jurisdiction[1] of their home State. This exceptional condition of things is based, as regards Turkey, on custom and treaties which are called Capitulations,

[1] See below, § 440.

as regards other Eastern States on treaties only.[1] Jurisdiction over foreigners in these countries is exercised by the consuls of their home States, which have enacted special Municipal Laws for that purpose. Thus, Great Britain has enacted so-called Foreign Jurisdiction Acts at several times, which are now all consolidated in the Foreign Jurisdiction Act of 1890.[2] It must be specially mentioned that Japan has since 1899 ceased to belong to the Eastern States in which foreigners are exempt from local jurisdiction.

Foreigners under the Protection of their Home State.

§ 319. Although foreigners fall at once under the territorial supremacy of the State they enter, they remain nevertheless under the protection of their home State. By a universally recognised customary rule of the Law of Nations every State holds a right of protection[3] over its citizens abroad, to which corresponds the duty of every State to treat foreigners on its territory with a certain consideration which will be discussed below, §§ 320–322. The question here is only when and how this right of protection can be exercised. Now there is certainly, as far as the Law of Nations is concerned, no duty incumbent upon a State to exercise its protection over its citizens abroad. The matter is absolutely in the discretion of every State, and no foreigner has by International Law, although he may have it by Municipal Law, a right to demand protection from his home State. Often for political reasons States have in certain cases refused the exercise of their

[1] See Twiss, I. § 163, who enumerates many of these treaties; see also Phillimore, I. §§ 336-339, and Hall, Foreign Powers and Jurisdiction, §§ 59–91.

[2] 53 & 54 Vict. c. 37.

[3] This right has, I believe, grown up in furtherance of intercourse between the members of the Family of Nations (see above, § 142); Hall (§ 87) and others deduce this indubitable right from the "fundamental" right of self-preservation.

right of protection over citizens abroad. Be that as it may, every State *can* exercise this right when one of its subjects is wronged abroad in his person or property, either by the State itself on whose territory such person or property is for the time, or by such State's officials or citizens without such State's interfering for the purpose of making good the wrong done.[1] And this right can be realised in several ways. Thus, a State whose subjects are wronged abroad can diplomatically insist upon the wrongdoers being punished according to the law of the land and upon damages, if necessary, being paid to its subjects concerned. It can, secondly, exercise retorsion and reprisals for the purpose of making the other State comply with its demands. It can, further, exercise intervention, and it can even go to war when necessary. And there are other means besides those mentioned. It is, however, quite impossible to lay down hard and fast rules as regards the question, in which way and how far in every case the right of protection ought to be exercised. Everything depends upon the merits of the individual case and must be left to the discretion of the State concerned. The latter will have to take into consideration whether the wronged foreigner was only travelling through or had settled down in the country, whether his behaviour has been provocative or not, how far the foreign Government identified itself with the acts of officials or subjects, and the like.

Protection to be afforded to Foreigners' Persons and Property.

§ 320. Under the influence of the right of protection over its subjects abroad which every State holds, and the corresponding duty of every State to

[1] Concerning the responsibility of a State for internationally injurious acts of its own, its organs and other officials, and its subjects, see above, §§ 151–167. The right of protection over citizens abroad is in detail discussed by Hall, § 87, and Westlake, I. pp. 313–320.

treat foreigners on its territory with a certain consideration, a foreigner, provided he owns a nationality at all, cannot be outlawed in foreign countries, but must be afforded such protection of his person and property as is enjoyed by a citizen. The home State of the foreigner has by its right of protection a claim upon such State as allows him to enter its territory that such protection should be afforded. In consequence thereof every State is by the Law of Nations compelled to grant to foreigners equality before the law with its citizens as far as safety of person and property is concerned.[1] A foreigner must in especial not be wronged in person or property by the officials and Courts of a State. Thus, the police must not arrest him without just cause, custom-house officials must treat him civilly, Courts of Justice must treat him justly and in accordance with the law. Corrupt administration of the law against natives is no excuse for the same against foreigners, and no Government can cloak itself with the judgment of corrupt judges.

How far Foreigners can be treated according to Discretion.

§ 321. Apart from protection of person and property, every State can treat foreigners according to discretion, those points excepted concerning which discretion is restricted through international treaties between the States concerned. Thus, a State can exclude foreigners from certain professions and trades; it can, as Great Britain did formerly and Russia does even to-day, exclude them from holding real property; it can, as again Great Britain[2] did in former times, compel them to have their names registered for the purpose of keeping them under control, and the like. It must, however, be stated

[1] But not otherwise.

[2] See an Act for the Registration of Aliens, &c., 1836 (6 & 7 William IV. c. 11).

that there is a tendency within all the States which are members of the Family of Nations to treat admitted foreigners more and more on the same footing as citizens, political rights and duties, of course, excepted. Thus, for instance, with the only exception that a foreigner cannot be sole or part owner of a British ship, foreigners having taken up their domicile in this country are for all practical purposes treated by the law [1] of the land on the same footing as British subjects.

Departure from the Foreign Country.

§ 322. Since a State holds territorial only, but not personal supremacy over a foreigner within its boundaries, it can never under any circumstances prevent him from leaving its territory, provided he has fulfilled his local obligations, as payment of rates and taxes, of fines, of private debts, and the like. And a foreigner leaving a State can take all his property away with him, and a tax for leaving the country or tax upon the property he takes away with him [2] cannot be levied. And it must be specially mentioned that since the beginning of the nineteenth century the so-called *droit d'aubaine* belongs to the past; this is the name of the right, which was formerly frequently exercised, of a State to confiscate the whole estate of a foreigner deceased on its territory.[3] But if a State levies estate duties in the case of a citizen dying on its territory, as Great Britain does according to the Finance Act [4] of 1894, such duties can likewise be levied in case of a foreigner dying on its territory.

[1] That foreigners cannot now any longer belong to the Bar or to the London Stock Exchange, is an outcome not of British Municipal Law, but of regulations of the Inns of Court and the Stock Exchange.

[2] So-called *gabella emigrationis.*

[3] See details in Wheaton, § 82. The *droit d'aubaine* was likewise named *jus albinagii.*

[4] 57 & 58 Vict. c. 30. Estate duty is levied in Great Britain in

VIII

Expulsion of Foreigners

Hall, § 63—Westlake, I. p. 210—Phillimore, I. § 364—Halleck, I. pp. 460-461—Taylor, § 186—Walker, § 19—Wharton, II. § 206—Bluntschli, §§ 383-384—Stoerk in Holtzendorff, II. pp. 646-656—Ullmann, § 102—Bonfils, No. 442—Despagnet, Nos. 347-348—Pradier-Fodéré, III. Nos. 1857-1859—Rivier, I. pp. 311-314—Calvo, VI. §§ 119-125—Martens, I. § 79—Bleteau, "De l'asile et de l'expulsion" (1886)—Berc, "De l'expulsion des étrangers" (1888)—Féraud-Giraud, "Droit d'expulsion des étrangers" (1889)—Langhard, "Das Recht der politischen Fremdenausweisung" (1891)—Rolin-Jacquemyns in R.I., XX. (1888), pp. 499 and 615.

Competence to expel Foreigners.

§ 323. Just as a State is competent to refuse admittance to a foreigner, so it is in conformity with its territorial supremacy competent to expel at any moment a foreigner who has been admitted into its territory. And it matters not whether the respective individual is only on a temporary visit or has settled down for professional or business purposes on that territory, having taken his domicile thereon. Such States, of course, as have a high appreciation of individual liberty and abhor arbitrary powers of Government will not readily expel foreigners. Thus, the British Government has no power to expel even the most dangerous foreigner without an Act of Parliament making provision for such expulsion. And in Switzerland, article 70 of the Constitution empowers the Government to expel such foreigners only as endanger the internal and external safety of the land. But many States are in no way prevented

the case also of such foreigner dying abroad as leaves movable property in the United Kingdom without having ever been resident there. As far as the Law of Nations is concerned, it is doubtful whether Great Britain is competent to claim estate duties in such cases.

by their Municipal Law from expelling foreigners according to discretion, and examples of arbitrary expulsion of foreigners, who had made themselves objectionable to the respective Governments, are numerous in the past and the present.

On the other hand, it cannot be denied that, especially in the case of expulsion of a foreigner who has been residing within the expelling State for some length of time and has established a business there, the home State of the expelled individual is by its right of protection over citizens abroad justified in making diplomatic representations to the expelling State and asking for the reasons for the expulsion. But as in strict law a State can expel even domiciled foreigners without so much as giving the reasons, the refusal of the expelling State to supply the reasons for expulsion to the home State of the expelled foreigner does not constitute an illegal, although a very unfriendly, act. And there is no doubt that every expulsion of a foreigner without just cause is, in spite of its international legality, an unfriendly act, which can rightfully be met with retorsion.

Just Causes of Expulsion of Foreigners.

§ 324. On account of the fact that retorsion might be justified, the question is of importance what just causes of expulsion of foreigners there are. As International Law gives no detailed rules regarding expulsion, everything is left to the discretion of the single States and depends upon the merits of the individual case. Theory and practice correctly make a distinction between expulsion in time of war and in time of peace. A belligerent may consider it convenient to expel all enemy subjects residing or temporarily staying within his territory. And, although such a measure may be very hard and cruel, the opinion is general that such expulsion is

justifiable.[1] As regards expulsion in time of peace, on the other hand, the opinions of writers as well as of States naturally differ much. Such State as expels a foreigner will hardly admit not having had a just cause. Some States, as Belgium[2] since 1885, possess Municipal Laws determining just causes for the expulsion of foreigners, and such States' discretion concerning expulsion is, of course, more or less restricted. But many States do not possess such laws, and are, therefore, totally at liberty to consider a cause as justifying expulsion or not. The Institute of International Law at its meeting at Geneva in 1892 adopted a body of forty-one articles concerning the admittance and expulsion of foreigners, and in article 28 thereof enumerated nine just causes for expulsion in time of peace.[3] I doubt whether the States will ever come to an agreement about just causes of expulsion. The fact cannot be denied that a foreigner is more or less a guest in the foreign land, and the question under what conditions such guest makes himself objectionable to his host cannot once for all be answered by the establishment of a body of rules. So much is certain, that with the gradual disappearance of despotic views in the different States, and with the advance of true constitutionalism guaranteeing individual liberty and freedom of opinion and speech, expulsion of foreigners, especially for political reasons, will become less frequent. Expulsion will, however, never disappear totally, because it may well be justified. Thus, for example,

[1] Thus in 1870, during the Franco-German war, the French expelled all Germans from France, and the former South African Republic expelled in 1899, during the Boer war, almost all British subjects. See below, vol. II. § 100.

[2] See details in Rivier, I. p. 312.

[3] See Annuaire, XII. p. 223. Many of these causes, as conviction for crimes, for instance, are certainly just causes, but others are doubtful.

Prussia after the annexation of the formerly Free Town of Frankfort-on-the-Main, was certainly justified in expelling those individuals who, for the purpose of avoiding military service in the Prussian Army, had by naturalisation become Swiss citizens without giving up their residence at Frankfort.

Expulsion how effected.

§ 325. Expulsion is, in theory at least, not a punishment, but an administrative measure consisting in an order of the Government directing a foreigner to leave the country. Expulsion must therefore be effected with as much forbearance and indulgence as the circumstances and conditions of the case allow and demand, especially when expulsion is meted out to a domiciled foreigner. And the home State of the expelled, by its right of protection over its citizens abroad, may well insist upon such forbearance and indulgence. But this is valid as regards the first expulsion only. Should the expelled refuse to leave the territory voluntarily or, after having left, return without authorisation, he may be arrested, punished, and forcibly brought to the frontier.

Reconduction in Contradistinction to Expulsion.

§ 326. In many Continental States destitute foreigners, foreign vagabonds, suspicious foreigners without papers of legitimation, foreign criminals who have served their punishment, and the like, are without any formalities arrested by the police and reconducted to the frontier. There is no doubt that the competence for such reconduction, which is often called *droit de renvoi*, is an inference from the territorial supremacy of every State, for there is no reason whatever why a State should not get rid of such undesirable foreigners as speedily as possible. But although such reconduction is materially not much different from expulsion, it nevertheless differs much from this in form, since expulsion is an order

to leave the country, whereas reconduction is forcible conveying away of foreigners.[1] The home State of such reconducted foreigners has the duty to receive them, since, as will be remembered,[2] a State cannot refuse to receive such of its subjects as are expelled from abroad. Difficulties arise, however, sometimes concerning the reconduction of such foreign individuals as have lost their nationality through long-continued absence[3] from home without having acquired another nationality abroad. Such cases are a further example of the fact that the very existence of stateless individuals is a blemish in Municipal as well as International Law.[4]

IX

Extradition

Hall, §§ 13 and 63—Westlake, I. pp. 241–251—Lawrence, §§ 132–133—Phillimore, I. §§ 365–389D—Twiss, I. § 236—Halleck, I. pp. 257–268—Taylor, §§ 205–211—Walker, § 19—Wharton, II. §§ 268–282 Wheaton, §§ 115–121—Bluntschli, §§ 394–401—Hartmann, § 89—Heffter, § 63—Lammasch in Holtzendorff, III. pp. 454–566—Liszt, § 32—Ullmann, §§ 113–117—Bonfils, Nos. 455–481—Despagnet, Nos. 289–315—Pradier-Fodéré, III. Nos. 1863–1893—Rivier, I. pp. 348–357—Calvo, II. §§ 949–1071—Martens, II. §§ 91–98—Spear, "The Law of Extradition" (1879)—Lammasch, "Auslieferunsgspflicht und Asylrecht" (1887)—Martitz, "Internationale Rechtshilfe in Strafsachen," 2 vols. (1888 and 1897)—Moore, "Treatise on Extradition" (1891)—Hawley, "The Law of International Extradition" (1893)—Clark, "The Law of Extradition" (3rd ed. 1903)—Biron and Chalmers, "The Law and Practice of Extradition" (1903)—See the French, German, and Italian literature concerning extradition quoted by Fauchille in Bonfils, No. 455.

Extradition no legal duty.

§ 327. Extradition is the delivery of a prosecuted individual to the State on whose territory he has

[1] Rivier, I. p. 308, correctly distinguishes between reconduction and expulsion, but Phillimore, I. § 364, seems to confound both.

[2] See above, § 294.

[3] See above, § 302, No. 3.

[4] It ought to be mentioned that many States have, either by special treaties or in their treaties of commerce, friendship, and the like, stipulated proper treatment of each other's destitute subjects on each other's territory.

committed a crime by the State on whose territory the criminal is for the time staying. Although Grotius[1] holds that every State has the duty either to punish itself or to surrender to the prosecuting State such individuals within its boundaries as have committed a crime abroad, and although there is as regards the majority of such cases an important interest of civilised mankind that this should be done, this rule of Grotius has never been adopted by the States and has, therefore, never become a rule of the Law of Nations. On the contrary, the States have always upheld their competence to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases excepted which fall under the stipulations of special extradition treaties, if any. There is, therefore, no universal rule of customary International Law in existence which commands[2] extradition.

Extradition Treaties how arisen.

§ 328. Since, however, modern civilisation demands categorically extradition of criminals as a rule, numerous treaties have been concluded between the single States stipulating the cases in which extradition shall take place. According to these treaties, individuals prosecuted for more important crimes, political crimes excepted, are actually always surrendered to the prosecuting State, if not punished locally. But this solution of the problem of extradition is a product of the nineteenth century only. Before the eighteenth century extradition of ordinary criminals

[1] II. c. 21, § 4.

[2] Clarke, l.c. pp. 1–15, tries to prove that a duty to extradite criminals does exist, but the result of all his labour is that he finds that the refusal of extradition is "a serious violation of the moral obligations which exist between civilised States" (see p. 14). But nobody has ever denied this as far as the regular criminal is concerned. The question is only whether an international *legal* duty exists to surrender a criminal. And this *legal* duty the States have always denied.

hardly occurred, although the States used then frequently to surrender to each other political fugitives, heretics, and even emigrants, either in consequence of special treaties stipulating the surrender of such individuals, or voluntarily without such treaties. Matters began to undergo a change in the eighteenth century, for then treaties between neighbouring States stipulated frequently the extradition of ordinary criminals besides that of political fugitives, conspirators, military deserters, and the like. Vattel[1] is able to assert in 1758 that murderers, incendiaries, and thieves are regularly surrendered by neighbouring States to each other. But general treaties of extradition between all the members of the Family of Nations did not exist in the eighteenth century, and there was hardly a necessity for such general treaties, since traffic was not so developed as nowadays and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of a neighbouring State. When, however, in the nineteenth century, with the appearance of railways and Transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries. It was then and thereby that the conviction was forced upon the States of civilised humanity that it was in their common interest to surrender ordinary criminals regularly to each other. General treaties of extradition became, therefore, a necessity, and the single States succeeded in concluding such treaties with each other. There is no civilised State in existence nowadays which has not concluded such treaties with the majority of the other civilised States. And the consequence is that, although no universal rule of International Law commands it, extradition

[1] II. § 76.

of criminals between the States is an established fact based on treaties.

Municipal Extradition Laws.

§ 329. Some States, however, were unwilling to depend entirely upon the discretion of their Governments as regards the conclusion of extradition treaties and the procedure in extradition cases. They have therefore enacted special Municipal Laws which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases. These Municipal Laws[1] furnish the basis for extradition treaties to be concluded. The first in the field with such an extradition law was Belgium in 1833, which remained, however, for far more than a generation quite isolated. It was not until 1870 that England followed the example given by Belgium. English public opinion was for many years against extradition treaties at all, considering them as a great danger to individual liberty and to the competence of every State to grant asylum to political refugees. This country possessed, therefore, before 1870 a few extradition treaties only, which moreover were in many points inadequate. But in 1870 the British Government succeeded in getting Parliament to pass the Extradition Act.[2] This Act, which was amended by another in 1873[3] and a third in 1895,[4] has furnished the basis for extradition treaties of Great Britain with thirty-five other States.[5] Belgium

[1] See Martitz, Internationale Rechtshilfe, I. pp. 747–818, where the history of all these laws is sketched and their text is printed.

[2] 33 & 34 Vict. c. 52.

[3] 36 & 37 Vict. c. 60.

[4] 58 & 59 Vict. c. 33. On the history of extradition in Great Britain before the Extradition Act, 1870, see Clarke, pp. 126–166.

[5] The full text of these treaties is printed by Clarke, as well as Biron and Chalmers. Not to be confounded with extradition of criminals to foreign States is extradition within the British Empire from one part of the British dominions to another. This matter is regulated by the Fugi-

enacted a new extradition law in 1874. Holland enacted such a law in 1875, Luxemburg in the same year, Argentina in 1885, the Congo Free State in 1886, Peru in 1888, Switzerland in 1892.

Such States as possess no extradition laws and whose written Constitution does not mention the matter, leave it to their Governments to conclude extradition treaties according to their judgment. And in these countries the Governments are competent to extradite an individual even if no extradition treaty exists.

Object of Extradition.

§ 330. Since extradition is the delivery of an incriminated individual to the State on whose territory he has committed a crime by the State on whose territory he is for the time staying, the object of extradition can be any individual, whether he is a subject of the prosecuting State, or of the State which is required to extradite him, or of a third State. Many States, however, as France and most other States of the European continent, have adopted the principle never to extradite one of their subjects to a foreign State, but to punish themselves subjects of their own for grave crimes committed abroad. Other States, as Great Britain and the United States, have not adopted this principle, and do extradite such of their subjects as have committed a grave crime abroad. Thus Great Britain surrendered in 1879 to Austria, where he was convicted and hanged,[1] one Tourville, a British subject, who, after having

tive Offenders Act, 1881 (44 & 45 Vict. c. 169).

[1] This case is all the more remarkable, as (see 24 & 25 Vict. c. 100, § 9) the criminal law of England extends over murder and manslaughter committed abroad by English subjects, and as, according to article 3 of the extradition treaty between England and Austria-Hungary of 1873, the contracting parties are in no case under obligation to extradite their own subjects.

murdered his wife in the Tyrol, had fled home to England.

And it must be emphasised that the object of extradition is an individual who has committed a crime abroad, whether or not he was physically present during the commission of the criminal act on the territory of the State where the crime was committed. Thus, in 1884, Great Britain surrendered one Nillins to Germany, who, by sending from Liverpool forged bills of exchange to a merchant in Germany as payment for goods ordered, was considered to have committed forgery and to have obtained goods by false pretences in Germany.[1]

Extraditable Crimes.

§ 331. Unless a State is restricted by an extradition law, it can grant extradition for any crime as it thinks fit. And unless a State is bound by an extradition treaty, it can refuse extradition for any crime. Such States as possess extradition laws frame their extradition treaties conformably therewith and specify in those treaties all the crimes for which they are willing to grant extradition. And no person is to be extradited whose deed is not a crime according to the Criminal Law of the State which is asked to extradite, as well as of the State which demands extradition. As regards Great Britain, the following are extraditable crimes according to the Extradition Act of 1870:—Murder and manslaughter; counterfeiting and uttering counterfeit money; forgery and uttering what is forged; embezzlement and larceny; obtaining goods or money by false pretences; crimes by bankrupts against bankruptcy laws; fraud by a bailee, banker, agent, factor, trustee, or by a director, or member, or public officer

[1] See Clarke, l. c. pp. 177 and 262, who, however, disapproves o this surrender.

of any company; rape; abduction; child stealing; burglary and housebreaking; arson; robbery with violence; threats with intent to extort; piracy by the Law of Nations; sinking or destroying a vessel at sea; assaults on board ship on the High Seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy against the authority of the master on board a ship on the High Seas. The Extradition Act of 1873 added the following crimes to the list:—Kidnapping, false imprisonment, perjury, and subornation of perjury.

Political criminals are, as a rule, not extradited,[1] and according to many extradition treaties military deserters and such persons as have committed offences against religion are likewise excluded from extradition.

Effectuation and Condition of Extradition.

§ 332. Extradition is granted only if asked for, and after the formalities have taken place which are stipulated in the treaties of extradition and the extradition laws, if any. It is effected through the handing over of the criminal by the police of the extraditing State to the police of the prosecuting State. But it must be emphasised that, according to all extradition treaties, it is a condition that the extradited individual shall be tried and punished for those crimes exclusively for which his extradition has been asked and granted.[2] If an extradited individual is nevertheless tried and punished for another crime, the extraditing State has a right of intervention.

[1] See below, §§ 333–340.

[2] It ought to be mentioned that the Institute of International Law in 1880, at its meeting in Oxford (see Annuaire, V. p. 117), adopted a body of twenty-six rules concerning extradition.

X

Principle of Non-extradition of Political Criminals

Westlake, I. pp. 247–248—Lawrence, § 133—Taylor, § 212—Wharton, II. § 272—Bluntschli, § 396—Hartmann, § 89—Lammasch in Holtzendorff, III. pp. 485–510—Liszt, § 32—Ullmann, § 115—Rivier, I. pp. 351–357—Calvo, II. §§ 1034–1036—Martens, II. § 96—Bonfils, Nos. 466–467—Despagnet, No. 304—Pradier-Fodéré, III. Nos. 1871–1873—Soldan, "L'extradition des criminels politiques" (1882)—Martitz, "Internationale Rechtshilfe in Strafsachen," vol. II. (1897), pp. 134–707—Lammasch, "Auslieferungspflicht und Asylrecht" (1887), pp. 203–355—Grivaz, "Nature et effets du principe de l'asyle politique" (1895).

How Non-extradition of Political Criminals became the Rule.

§ 333. Before the French Revolution[1] the term "political crime" was unknown in either the theory or the practice of the Law of Nations. And the principle of non-extradition of political criminals was likewise non-existent. On the contrary, whereas extradition of ordinary criminals was, before the eighteenth century at least, hardly ever stipulated, treaties very often stipulated the extradition of individuals who had committed such deeds as are nowadays termed "political crimes," and such individuals were frequently extradited even when no treaty stipulated it.[2] And writers in the sixteenth and seventeenth centuries did not at all object to such practice on the part of the States; on the contrary, they frequently approved of it.[3] It is indirectly due to the French Revolution that matters gradually underwent a change, since this event was the starting-point for the revolt in the nineteenth century against

[1] I follow in this section for the most part the summary of the facts given by Martitz, l. c. II. pp. 134–184.

[2] Martitz, l. c. II. p. 177, gives a list of important extraditions of political criminals which took place between 1648 and 1789.

[3] So Grotius, II. c. 21, § 5, No. 5.

despotism and absolutism throughout the western part of the European continent. It was then that the term "political crime" arose, and article 120 of the French Constitution of 1793 granted asylum to foreigners exiled from their home country "for the cause of liberty." On the other hand, the French emigrants, who had fled from France to escape the Reign of Terror, found an asylum in foreign States. However, the modern principle of non-extradition of political criminals even then did not conquer the world. Until 1830 political criminals frequently were extradited. But public opinion in free countries began gradually to revolt against such extradition, and Great Britain was its first opponent. The fact that several political fugitives were surrendered by the Governor of Gibraltar to Spain created a storm of indignation in Parliament in 1815, where Sir James Mackintosh proclaimed the principle that no nation ought to refuse asylum to political fugitives. And in 1816 Lord Castlereagh declared that there could be no greater abuse of the law than by allowing it to be the instrument of inflicting punishment on foreigners who had committed political crimes only. The second in the field was Switzerland, the asylum for many political fugitives from neighbouring countries, when, after the final defeat of Napoleon, the reactionary Continental monarchs refused the introduction of constitutional reforms which were demanded by their peoples. And although, in 1823, Switzerland was forced by the threats of the reactionary leading Powers of the Holy Alliance to restrict somewhat the asylum afforded by her to individuals who had taken part in the unsuccessful political revolts in Naples and Piedmont, the principle of non-extradition went on fighting its way. The question as to that asylum was discussed

with much passion in the press of Europe. And although the principle of non-extradition was far from becoming universally recognised, that discussion fostered its growth indirectly. A practical proof thereof is that in 1830 even Austria and Prussia, two of the reactionary Powers of that time, refused Russia's demand for the extradition of fugitives who had taken part in the Polish Revolution of that year. And another proof thereof is that at about the same time, in 1829, a celebrated dissertation [1] by a Dutch jurist made its appearance, in which the principle of non-extradition of political criminals was for the first time defended with juristic arguments and on a juristic basis.

On the other hand, a reaction set in in 1833, when Austria, Prussia, and Russia concluded treaties which remained in force for a generation, and which stipulated that henceforth individuals who had committed crimes of high treason and *lèse-majesté*, or had conspired against the safety of the throne and the legitimate Government, or had taken part in a revolt, should be surrendered to the State concerned. The same year, however, is epoch-making in favour of the principle of non-extradition of political criminals, for in 1833 Belgium enacted her celebrated extradition law, the first of its kind, being the very first Municipal Law which expressly interdicted the extradition of foreign political criminals. As Belgium, which had seceded from the Netherlands in 1830 and became recognised and neutralised by the Powers in 1831, owed her very existence to revolt, she felt the duty of making it a principle of her Municipal Law to grant asylum to foreign political fugitives, a principle which was for the first time put

[1] H. Provó Kluit, *De deditione profugorum.*

into practice in the treaty of extradition concluded in 1834 between Belgium and France. The latter, which to the present day has no municipal extradition law, has nevertheless henceforth always in her extradition treaties with other Powers stipulated the principle of non-extradition of political criminals. And the other Powers followed gradually. Even Russia had to give way, and since 1867 this principle is to be found in all extradition treaties of Russia with other Powers, that with Spain of 1888 excepted. It is due to the stern attitude of Great Britain, Switzerland, Belgium, France, and the United States that the principle has conquered the world. These countries, in which individual liberty is the very basis of all political life, and constitutional government a political dogma of the nation, watched with abhorrence the methods of government of many other States between 1815 and 1860. These Governments were more or less absolute and despotic, repressing by force every endeavour of their subjects to obtain individual liberty and a share in the government. Thousands of the most worthy citizens and truest patriots had to leave their country for fear of severe punishment for political crimes. Great Britain and the other free countries felt in honour bound not to surrender such exiled patriots to the persecution of their Governments, but to grant them an asylum.

Difficulty concerning the Conception of Political Crime.

§ 334. Although the principle became and is generally [1] recognised that political criminals shall not be extradited, serious difficulties exist concerning the conception of "political crime." Such conception is of great importance, as the extradition of a criminal may depend upon it. It is unnecessary

[1] See, however, below, § 340, concerning the reactionary movement in the matter.

here to discuss the numerous details of the controversy. It suffices to state that whereas many writers call such crime "political" as was committed from a political motive, others call "political" any crime committed for a political purpose; again, others recognise such crime only as "political" as was committed from a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term "political crime" to certain offences against the State only, as high treason, *lèse-majesté*, and the like. To the present day all attempts have failed to formulate a satisfactory conception of the term, and the reason of the thing will, I believe, for ever exclude the possibility of finding a satisfactory conception and definition. The difficulty is caused through the so-called "relative political crimes" or *délits complexes*—namely, those complex cases in which the political offence comprises at the same time an ordinary crime, such as murder, arson, theft, and the like. Some writers deny categorically that such complex crimes are political; but this opinion is wrong and dangerous, since indeed many honourable political criminals would have to be extradited in consequence thereof. On the other hand, it cannot be denied that many cases of complex crimes, although the deed may have been committed from a political motive or for a political purpose, are such as ought not to be considered political. Such cases have roused the indignation of the whole civilised world, and have indeed endangered the very value of the principle of non-extradition of political criminals. Three practical attempts have therefore been made to deal with such complex crimes without violating this principle.

The so-called Belgian *Attentat* Clause.

§ 335. The first attempt was the enactment of the so-called *attentat* clause by Belgium in 1856,[1] following the case of Jacquin in 1854. A French manufacturer named Jules Jacquin, domiciled in Belgium, and a foreman of his factory named Célestin Jacquin, who was also a Frenchman, tried to cause an explosion on the railway line between Lille and Calais with the intention of murdering the Emperor Napoleon III. France requested the extradition of the two criminals, but the Belgian Court of Appeal had to refuse the surrender on account of the Belgian extradition law interdicting the surrender of political criminals. To provide for such cases in the future, Belgium enacted in 1856 a law amending her extradition law and stipulating that murder of the head of a foreign Government or of a member of his family should not be considered a political crime. Gradually all European States, with the exception of England, Italy, and Switzerland, have adopted that *attentat* clause, and a great many Continental writers urge its adoption by the whole of the civilised world.

The Russian Project of 1881.

§ 336. Another attempt to deal with complex crimes without detriment to the principle of non-extradition of political criminals was made by Russia in 1881. Influenced by the murder of the Emperor Alexander II. in that year, Russia invited the Powers to hold an International Conference at Brussels for the consideration of the proposal that thenceforth no murder or attempt to murder ought to be considered as a political crime. But the Conference did not take place, since Great Britain as well as France declined to take part in it.[2] Thus the development of things had come to a standstill, many States having

[1] See details in Martitz, l. c. II. p. 372.

[2] See details in Martitz, l. c. II. p. 479.

adopted, others declining to adopt, the Belgian clause, and the Russian proposal having fallen through.

The Swiss Solution of the Problem in 1892.

§ 337. Eleven years later, in 1892, Switzerland attempted a solution of the problem on a new basis. In that year Switzerland enacted an extradition law whose article 10 recognises the non-extradition of political criminals, but lays down the rule at the same time that political criminals shall nevertheless be surrendered in case the chief feature of the offence wears more the aspect of an ordinary than of a political crime, and that the decision concerning the extraditability of such criminals rests with the "Bundesgericht," the highest Swiss Court of Justice. This Swiss rule contains a better solution of the problem than the Belgian *attentat* clause in so far as it allows the circumstances of the special case to be taken into consideration. And the fact that the decision is taken out of the hands of the Government and transferred to the highest Court of the country, denotes likewise a remarkable progress. For the Government cannot now be blamed whether extradition is granted or refused, the decision of an independent Court of Justice being a certain guarantee that an impartial view of the circumstances of the case has been taken.[1]

Rationale for the Principle of Non-extradition of Political Criminals.

§ 338. The numerous attempts against the lives of heads of States, as the two attempts against the late Emperor William I. of Germany, the murder of Alexander II. of Russia in 1881, of President Carnot of France in 1894, of King Humbert of Italy in 1900, and the frequency of anarchistic crimes, have

[1] It ought to be mentioned that the Institute of International Law at its meeting at Geneva in 1892 (see Annuaire, XII. p. 182) adopted four rules concerning extradition of political criminals, but I do not think that these rules give on the whole much satisfaction.

shaken the value of the principle of non-extradition of political criminals in the opinion of the civilised world, as illustrated by the three practical attempts described above to meet certain difficulties. It is, consequently, no wonder that some writers[1] plead openly and directly for the abolition of this principle, maintaining that it was only the product of abnormal times and circumstances such as were in existence during the first half of the nineteenth century, and that with their disappearance the principle is likely to do more harm than good. And indeed it cannot be denied that the application of the principle in favour of some criminals, such as the anarchistic murderers and bomb-throwers, could only be called an abuse. But the question is whether, apart from such exceptional cases, the principle itself is still to be considered as justified or not.

Without doubt the answer must be in the affirmative. I readily admit that every political crime is by no means an honourable deed, which as such deserves protection. Still, political crimes are committed by the best of patriots, and, what is of more weight, they are in many cases a consequence of oppression on the part of the respective Governments. They are comparatively infrequent in free countries, where there is individual liberty, where the nation governs itself, and where, therefore, there are plenty of legal ways to bring grievances before the authorities. A free country can never agree to surrender foreigners to their prosecuting home State for deeds done in the interest of the same freedom and liberty which the subjects of such free country enjoy. For individual liberty and self-government of nations are demanded by modern civilisation, and their gradual realisation

[1] See, for instance, Rivier, I. p. 354.

over the whole globe is conducive to the welfare of the human race.

Political crimes may certainly be committed in the interest of reaction as well as in the interest of progress, and reactionary political criminals may have occasion to ask for asylum as well as progressive political criminals. The principle of non-extradition of political criminals indeed extends its protection over the former too, and this is the very point where the value of the principle reveals itself. For no State has a right to interfere with the internal affairs of another State, and, if a State were to surrender reactionary political criminals but not progressive ones, the prosecuting State of the latter could indeed complain and consider the refusal of extradition an unfriendly act. If, however, non-extradition is made a general principle which finds its application in favour of political criminals of every kind, no State can complain if extradition is refused. Have not reactionary States the same faculty of refusing the extradition of reactionary political criminals as free States have of refusing the extradition of progressive political criminals?

Now, many writers agree upon this point, but maintain that such arguments meet the so-called purely political crimes only, and not the relative or complex political crimes, and they contend, therefore, that the principle of non-extradition ought to be restricted to the former crimes only. But to this I cannot assent. No revolt happens without such complex crimes taking place, and the individuals who commit them may indeed deserve the same protection as other political criminals. And, further, although I can under no circumstances approve of murder, can never sympathise with a murderer, and can never pardon

his crime, it may well be the case that the murdered official or head of a State has by inhuman cruelty and oppression himself whetted the knife which cut short his span of life. On the other hand, the mere fact that a crime was committed for a political purpose may well be without any importance in comparison with its detestability and heinousness. Attempts on heads of States, such, for example, as the murders of Presidents Lincoln and Carnot or of Alexander II. of Russia and Humbert of Italy, are as a rule, and all anarchistic crimes are without any exception, crimes of that kind. Criminals who commit such crimes ought under no circumstances to find protection and asylum, but ought to be surrendered for the purpose of receiving their just and appropriate punishment.

How to avoid Misapplication of the Principle of Non-extradition of Political Criminals.

§ 339. The question, however, is how to sift the chaff from the wheat, how to distinguish between such political criminals as deserve an asylum and such as do not. The difficulties are great and partly insuperable as long as we do not succeed in finding a satisfactory conception of the term "political crime." But such difficulties are only partly, not wholly, insuperable. The step taken by the Swiss extradition law of 1892 is so far in advance as to meet a great many of the difficulties. There is no doubt that the adoption of the Swiss rule by all the other civilised States would improve matters more than the universal adoption of the so-called Belgian *attentat* clause. The fact that according to Swiss law each case of complex political crime is unravelled and obtains the verdict of an independent Court according to the very circumstances, conditions, and requirements under which it occurred, is of the greatest value. For it enables every case

to be met in such a way as it deserves, without exposing and compromising the Government, and without sacrificing the principle of non-extradition of political criminals as a valuable rule. With the charge made by some writers[1] that the Swiss law does not give criteria for the guidance of the Court in deciding whether extradition for complex crimes should be granted or not, I cannot agree. In my opinion, the very absence of such criteria proves the superiority of the Swiss clause to the Belgian *attentat* clause. On the one hand, the latter is quite insufficient, for it restricts its stipulations to murder of heads of States and members of their families only. But I see no reason why individuals guilty of any murder—as provided by the Russian proposal—or who have committed other crimes, such as arson, theft, and the like, should not be surrendered in case the political motive or purpose of the crime is of no importance in comparison with the crime itself. On the other hand, the Belgian clause goes too far, since exceptional cases of murder of heads of States from political motives or for political purposes might occur which do not deserve extradition. The Swiss clause, however, with its absence of fixed distinctions between such complex crimes as are extraditable, and such as are not, permits the consideration of the circumstances, conditions, and requirements under which a complex crime was committed. It is true that the responsibility of the Court of Justice which has to decide whether such a complex crime is extraditable is great. But it is to be taken for granted that such Court will give its decision with impartiality, fairness, and justice. And it need not be feared that such

[1] See, for instance, Martitz, l. c. II. pp. 533–539.

Court will grant asylum to a murderer, incendiary, and the like, unless convinced that the deed was really political.

Reactionary Extradition Treaties.

§ 340. Be that as it may, the present condition of matters is a danger to the very principle of non-extradition of political criminals. Under the influence of the excitement caused by numerous criminal attempts in the last quarter of the nineteenth century, a few treaties have already been concluded which make a wide breach in this principle. It is Russia which is leading the reaction. This Power in 1885 concluded treaties with Prussia and Bavaria which stipulate the extradition of all individuals who have made an attack on the life, the body, or the honour[1] of a monarch, or of a member of his family, or who have committed any kind of murder or attempt to murder. And the extradition treaty between Russia and Spain of 1888 goes even further and abandons the principle of non-extradition of political criminals altogether. Fortunately, the endeavour of Russia to abolish this principle altogether has not succeeded. In her extradition treaty with Great Britain of 1886 she had to adopt it without any restriction, and in her extradition treaties with Portugal of 1887, with Luxemburg of 1892, and with the United States and Holland of 1893, she had to adopt it with a restrictive clause similar to the Belgian *attentat* clause.

[1] Thus, even for *lèse-majesté* extradition must be granted.

Part III

ORGANS OF THE STATES FOR THEIR INTERNATIONAL RELATIONS

CHAPTER I

HEADS OF STATES, AND FOREIGN OFFICES

I

Position of Heads of States according to International Law

Hall, § 97—Phillimore, II. §§ 101 and 102—Bluntschli, §§ 115-125—Holtzendorff in Holtzendorff, II. pp. 77-81—Ullmann, § 30—Rivier, I. § 32—Fiore, II. No. 1097—Bonfils, No. 632—Bynkershoek, "De foro legatorum" (1721), c. III. § 13.

Necessity of a Head for every State.

§ 341. As a State is an abstraction from the fact that a multitude of individuals live in a country under a Sovereign Government, every State must have a head as its highest organ, which represents it within and without its borders in the totality of its relations. Such head is the monarch in a monarchy and a president or a body of individuals, as the Bundesrath of Switzerland, in a republic. The Law of Nations prescribes no rules as regards the kind of head a State may have. Every State is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution it likes and of changing such Constitution according to its discretion. Some kind or other of a head of the State is, however, necessary according to International Law, as without a head there is no State in existence, but an anarchy.

§ 342. In case the head of a State changes, it is

Recognition of Heads of States.

usual to notify this fact to other States. The latter usually recognise the new head through some formal act, such as a congratulation, for example. But neither such notification nor recognition is strictly necessary according to International Law, as an individual becomes head of a State, not through the recognition of other States, but through Municipal Law. Such notification and recognition are, however, of legal importance. For through notification a State declares that the individual concerned is its highest organ, and has by Municipal Law the power to represent the State in the totality of its international relations. And through recognition the other States declare that they are ready to negotiate with such individual as the highest organ of his State. But recognition of a new head by other States is in every respect a matter of discretion. Neither has a State the right to demand from other States the recognition of its new head, nor has any State a right to refuse such recognition. Thus Russia, Austria, and Prussia refused until 1848 recognition to Isabella Queen of Spain, who had come to the throne as an infant in 1833. But in the long run recognition can practically not be withheld, for without it international intercourse is impossible, and States with self-respect will exercise retorsion if recognition is refused to the heads they have chosen. Thus, when, after the unification of Italy in 1861, Mecklenburg and Bavaria refused the recognition of Victor Emanuel as King of Italy, Count Cavour revoked the *exequatur* of the consuls of these States in Italy.

But it must be emphasised that recognition of a new head of a State by no means implies the recognition of such head as the legitimate head

of the State in question. Recognition is in fact nothing else than the declaration of other States that they are ready to deal with a certain individual as the highest organ of the particular State, and the question remains totally undecided whether such individual is or is not to be considered the legitimate head of that State.

Competence of Heads of States.

§ 343. The head of a State, as its chief organ and representative in the totality of its international relations, acts for his State in the latter's international intercourse, with the consequence that all his legally relevant international acts are considered acts of his State. His competence to perform such acts is termed *jus repraesentationis omnimodae*. It comprises in substance chiefly: reception and mission of diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace. But it is a question of the special case, how far this competence is independent of Municipal Law. For heads of States exercise this competence for their States and as the latter's representatives, and not in their own right. If a head of a State should, for instance, ratify a treaty without the necessary approval of his Parliament, he would go beyond his powers, and therefore such treaty would not be binding upon his State.[1]

On the other hand, this competence is certainly independent of the question whether a head of a State is the legitimate head or a usurper. The mere fact that an individual is for the time being the head of a State makes him competent to act as such head, and his State is legally bound by his acts. It may, however, be difficult to decide whether a certain individual is or is not the head of

[1] See below, § 497.

a State, for after a revolution some time always elapses before matters are settled.

Heads of States Objects of the Law of Nations.

§ 344. Heads of States are never subjects[1] of the Law of Nations. The position a head of a State has according to International Law is due to him, not as an individual, but as the head of his State. His position is derived from international rights and duties of his State, and not from international rights of his own. Consequently, all rights possessed by heads of States abroad are not international rights, but rights which must be granted to them by the Municipal Law of the foreign State on whose territory foreign heads of States are temporarily staying, and such rights must be granted in compliance with international rights of the home States of the respective heads. Thus, heads of States are not subjects but objects of International Law, and in this regard are like any other individual.

Honours and Privileges of Heads of States.

§ 345. All honours and privileges of heads of States due to them by foreign States are derived from the fact that dignity is a recognised quality of States as members of the Family of Nations and International Persons.[2] Concerning such honours and privileges, International Law distinguishes between monarchs and heads of republics. This distinction is the necessary outcome of the fact that the position of monarchs according to the Municipal Law of monarchies is totally different from the position of heads of republics according to the Municipal Law of the republics. For monarchs are sovereigns, but heads of republics are not.

[1] But Heffter (§ 48) maintains the contrary, and Phillimore (II. § 100) designates monarchs *mediately and derivatively* as subjects of International Law. The matter is treated in detail above, §§ 13 and 288–290; see also below, § 384.

[2] See above, § 121.

II

Monarchs

Vattel, I. §§ 28–45; IV. § 108—Hall, § 49—Lawrence, § 126—Phillimore, II. §§ 108–113—Taylor, § 129—Bluntschli, §§ 126–153—Heffter, §§ 48–57—Ullmann, §§ 31–32—Rivier, I. § 33—Calvo, III. §§ 1454–1479—Fiore, II. Nos. 1098–1102—Bonfils, Nos. 633–647—Pradier-Fodéré, III. Nos. 1564–1591.

Sovereignty of Monarchs.

§ 346. In every monarchy the monarch appears as the representative of the sovereignty of the State and thereby becomes a Sovereign himself, a fact which is recognised by International Law. And the difference between the Municipal Laws of the different States regarding this point matters in no way. Consequently, International Law recognises all monarchs as equally sovereign, although the difference between the constitutional positions of the monarchs is enormous, if looked upon in the light of the rules laid down by the Municipal Laws of the different States. Thus, the Emperor of Russia, who is an absolute monarch, and the King of England, who is sovereign in Parliament only, and therefore far from absolute, are indifferently sovereign according to International Law.

Consideration due to Monarchs at home.

§ 347. Not much need be said as regards the consideration due to a monarch from other States when within the boundaries of his own State. Foreign States have to give him his usual and recognised predicates[1] in all official communications. Every monarch must be treated as a peer of other monarchs, whatever difference in title and actual power there may be between them.

Consideration due to Monarchs abroad.

§ 348. As regards, however, the consideration due to a monarch abroad from the State on whose terri-

[1] Details as regards the predicates of monarchs are given above, § 119.

tory he is staying in time of peace and with the consent and the knowledge of the Government, details must necessarily be given. The consideration due to him consists in honours, inviolability, and exterritoriality.

(1) In consequence of his character of Sovereign, his home State has the right to demand that certain ceremonial honours be rendered to him, the members of his family, and the members of his retinue. He must be addressed by his usual predicates. Military salutes must be paid to him, and the like.

(2) As his person is sacrosanct, his home State has a right to insist that he be afforded special protection as regards personal safety, the maintenance of personal dignity, and the unrestrained intercourse with his Government at home. Every offence against him must be visited with specially severe penalties. On the other hand, he must be exempt from every kind of criminal jurisdiction. The wife of a Sovereign must be afforded the same protection and exemption.

(3) He must be granted so-called exterritoriality conformably with the principle: "*Par in parem non habet imperium*," according to which one Sovereign cannot have any power over another Sovereign. He must, therefore, in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff.[1] The house where he has taken his residence must enjoy the same exterritoriality as the official residence of an ambassador; no policeman or other official must be allowed to enter

[1] See Phillimore, II. § 113 A, where several cases tried by English Courts are discussed, in which foreign Sovereigns appeared as plaintiffs.

it without his permission. Even if a criminal takes refuge in such residence, the police must be prevented from entering it, although, if the criminal's surrender is deliberately refused, the Government may request the recalcitrant Sovereign to leave the country and then arrest the criminal. If a foreign Sovereign has property in a foreign country, such property is under the latter's jurisdiction. But as soon as such Sovereign takes his residence on the property, it must become exterritorial for the time being. Further, a Sovereign staying in a foreign country must be allowed to perform all his own governmental acts and functions, except when his country is at war with a third State and the State in which he is staying remains neutral. And, lastly, a Sovereign must be allowed, within the same limits as at home, to exercise civil jurisdiction over the members of his retinue. In former times even criminal jurisdiction over the members of his suite was very often claimed and conceded, but this is now antiquated.[1] The wife of a Sovereign must likewise be granted exterritoriality, but not other members of a Sovereign's family.[2]

However, exterritoriality is in the case of a foreign Sovereign, as in any other case, a fiction only, which is kept up for certain purposes within certain limits. Should a Sovereign during his stay within a foreign State abuse his privileges, such State is not obliged to bear such abuse tacitly and quietly, but can request him to leave the country. And when a

[1] A celebrated case happened in 1657 in France, when Christina, Queen of Sweden, although she had already abdicated, sentenced her chamberlain, Monaldeschi, to death, and had him executed by her bodyguard.

[2] See Rivier, I. p. 421, and Bluntschli, § 154; but, according to Bluntschli, exterritoriality need not in strict law be granted even to the wife of a Sovereign.

foreign Sovereign commits acts of violence or such acts as endanger the internal or external safety of the State, the latter can put him under restraint to prevent further acts of the same kind, but must at the same time bring him as speedily as possible to the frontier.

The Retinue of Monarchs abroad.

§ 349. The position of the individuals who accompany a monarch during his stay abroad is a matter of dispute. Some publicists maintain that the home State can claim the privilege of exterritoriality as well for the members of his suite as for the Sovereign himself, but others deny this.[1] I believe that the opinion of the former is correct, since I cannot see any reason why a Sovereign abroad should as regards the members of his suite be in an inferior position to a diplomatic envoy.[2]

Monarchs travelling incognito.

§ 350. Hitherto the case only has been treated where a monarch is staying in a foreign country with the official knowledge of the latter's Government. Such knowledge may be held in the case of a monarch travelling *incognito*, and he enjoys then the same privileges as if travelling not *incognito*. The only difference is that many ceremonial observances, which are due to a monarch, are not rendered to him when travelling *incognito*. But the case may happen that a monarch is travelling in a foreign country *incognito* without the latter's Government having the slightest knowledge thereof. Such monarch cannot then of course be treated otherwise than as any other foreign individual, but he can at any time make known his real character and assume the privileges due to him. Thus the late King William of Holland, when travelling *incognito* in Switzerland in 1873, was

[1] See Bluntschli, § 154, and Hall, § 49, in contradistinction to Martens, I. § 83.

[2] See below, §§ 401–405.

condemned to a fine for some slight contravention, but the sentence was not carried out, as he gave up his *incognito*.

Deposed and Abdicated Monarchs.

§ 351. All privileges mentioned must be granted to a monarch only as long as he is really the head of a State. As soon as he is deposed or has abdicated, he is no longer a Sovereign. Therefore in 1870 and 1872 the French Courts permitted, because she was deposed, a civil action against Queen Isabella of Spain, then living in Paris, for money due to the plaintiffs. Nothing, of course, prevents the Municipal Law of a State from granting the same privileges to a foreign deposed or abdicated monarch as to a foreign Sovereign, but the Law of Nations does not exact any such courtesy.

Regents.

§ 352. All privileges due to a monarch are also due to a Regent, at home or abroad, whilst he governs on behalf of an infant, or of a King who is through illness incapable of exercising his powers. And it matters not whether such Regent is a member of the King's family and a Prince of royal blood or not.

Monarchs in the service or subjects of Foreign Powers.

§ 353. When a monarch accepts any office in a foreign State, when he serves, for instance, in a foreign army, as the monarchs of the small German States have formerly frequently done, he submits to such State as far as the duties of the office are concerned, and his home State cannot claim any privileges for him that otherwise would be due to him.

When a monarch is at the same time a subject of another State, distinction must be made between his acts as a Sovereign on the one hand and his acts as a subject on the other. For the latter, the State whose subject he is has jurisdiction over him, but not for the former. Thus, in 1836, the Duke of Cumberland became King of Hanover, but at the

same time he was by hereditary title an English Peer and therefore an English subject. And in 1844, in the case *Duke of Brunswick* v. *King of Hanover*, the Master of the Rolls held that the King of Hanover was liable to be sued in the Courts of England in respect of any acts done by him as an English subject.[1]

III

Presidents of Republics

Bluntschli, § 134—Stoerk in Holtzendorff, II. p. 661—Ullmann, § 32—Rivier, I. § 33—Martens, I. § 80.

Presidents not Sovereigns.

§ 354. In contradistinction to monarchies, in republics the people itself, and not a single individual, appears as the representative of the sovereignty of the State, and accordingly the people styles itself the Sovereign of the State. And it will be remembered that the head of a republic may consist of a body of individuals, such as the Bundesrath in Switzerland. But in case the head is a President, as in France and the United States of America, such President represents the State, at least in the totality of its international relations. He is, however, not a Sovereign, but a citizen and subject of the very State whose head he is as President.

Position of Presidents in general.

§ 355. Consequently, his position at home and abroad cannot be compared with that of monarchs, and International Law does not empower his home State to claim for him the same, but only similar, consideration as that due to a monarch. Neither at home nor abroad, therefore, does a president of a

[1] See Phillimore, II. § 109.

republic appear as a peer of monarchs. Whereas all monarchs are in the style of the Court phraseology considered as though they were members of the same family, and therefore address each other in letters as "my brother," a president of a republic is usually addressed in letters from monarchs as "my friend." His home State can certainly at home and abroad claim such honours for him as are due to its dignity, but no such honours as must be granted to a Sovereign monarch.

Position of Presidents abroad.

§ 356. As to the position of a president when abroad, writers on the Law of Nations do not agree. Some [1] maintain that, since a president is not a Sovereign, his home State can never claim for him the same privileges as for a monarch, and especially that of exterritoriality. Others [2] make a distinction whether a president is staying abroad in his official capacity as head of a State or for his private purposes, and they maintain that his home State could only in the first case claim exterritoriality for him. Others [3] again will not admit any difference in the position of a president abroad from that of a monarch abroad. How the States themselves think as regards the position of the exterritoriality of presidents of republics abroad cannot be ascertained, since to my knowledge no case has hitherto occurred in practice from which a conclusion may be drawn. But practice seems to have settled the question of ceremonial honours due to a president officially abroad; they are such as correspond to the rank of his home State, and not such as are due to a monarch. As regards exterritoriality, I believe that future contin-

[1] Ullmann, § 32; Rivier, I. p. 423; Stoerk in Holtzendorff, II. p. 658.

[2] Martens, I. § 80; Bluntschli, § 134.

[3] Despagnet, No. 254; Bonfils, No. 632; Hall, § 97.

gencies will create the practice on the part of the States of granting this privilege to presidents and members of their suite in a similar way as to monarchs. I cannot see that there is any danger in such a grant. And nobody can deny that, if exterritoriality is not granted, all kinds of friction and even conflicts might arise. Although not Sovereigns, presidents of republics fill for the time being a sublime office, and the grant of exterritoriality to them is a tribute paid to the dignity of the States they represent.

IV

Foreign Offices

Heffter, § 201—Geffcken in Holtzendorff, III. p. 668—Ullmann, § 33—Rivier, I. § 34—Bonfils, Nos. 648–651.

Position of the Secretary for Foreign Affairs.

§ 357. As a rule nowadays no head of a State, be he a monarch or a president, negotiates directly and in person with a foreign Power, although this happens occasionally. The necessary negotiations are regularly conducted by the Foreign Office, an office which since the Westphalian Peace has been in existence in every civilised State. The chief of this office, the Secretary for Foreign Affairs, who is a Cabinet Minister, directs the foreign affairs of the State in the name of the head and with the latter's consent; he is the middleman between the head of the State and other States. And although many a head of a State directs in fact all the foreign affairs himself, the Secretary for Foreign Affairs is nevertheless the person through whose hands all transactions must pass. Now, as regards the position of such Foreign Secretary at home, it is the Municipal Law of a

State which regulates this. International Law defines his position regarding international intercourse with other States. He is the chief over all the ambassadors of the State, over its consuls, and over its other agents in matters international. It is he who either in person or through the envoys of his State approaches foreign States for the purpose of negotiating matters international. And again it is he whom foreign States through their Foreign Secretaries or their envoys approach for the like purpose. He is present when Ministers hand in their credentials to the head of the State. All documents of importance regarding foreign matters are signed by him or his substitute, the Under-Secretary for Foreign Affairs. It is, therefore, usual to notify the appointment of a new Foreign Secretary of a State to such foreign States as are represented within its boundaries by diplomatic envoys; the new Foreign Secretary himself makes this notification.

CHAPTER II

DIPLOMATIC ENVOYS

I

The Institution of Legation

Phillimore, II. §§ 143–153—Taylor, § 274—Twiss, § 199—Geffcken in Holtzendorff, III. pp. 605–618—Rivier, I. § 35—Ullmann, § 34—Martens, II. § 6—Gentilis, "De legationibus libri III." (1585)—Wicquefort, "L'Ambassadeur et ses fonctions" (1680)—Bynkershoek, "De foro legatorum" (1721)—Garden, "Traité complet de diplomatie" (3 vols. 1833)—Mirus, "Das Europäische Gesandtschaftsrecht" (2 vols. 1847)—Charles de Martens, "Le guide diplomatique" (2 vols. 1832; 6th ed. by Geffcken, 1866)—Montague Bernard, "Four Lectures on Subjects connected with Diplomacy" (1868), pp. 111–162 (3rd Lecture)—Alt, "Handbuch des Europäischen Gesandtschaftsrechts" (1870)—Pradier-Fodéré, "Cours de droit diplomatique" (2 vols. 1881)—Krauske, "Die Entwickelung der ständigen Diplomatie," etc. (1885). Lehr, "Manuel théorique et pratique des agents diplomatiques" (1888).

Development of Legations.

§ 358. Legation as an institution for the purpose of negotiating between different States is as old as history, whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity, where no such law as the modern International Law was known, ambassadors enjoyed everywhere a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct. Yet permanent legations were unknown till very late in the Middle Ages. The fact that the Popes had permanent representatives—so-called *apocrisiarii* or *responsales*—at the Court of the Frankish Kings and

at Constantinople until the final separation of the Eastern from the Western Church, ought not to be considered as the first example of permanent legations, as the task of these papal representatives had nothing to do with international affairs, but with those of the Church only. It was not until the thirteenth century that the first permanent legations made their appearance. The Italian Republics, and Venice in especial, created the example [1] by keeping representatives stationed at one another's capitals for the better negotiation of their international affairs. And in the fifteenth century these Republics began to keep permanent representatives in Spain, Germany, France, and England. Other States followed the example. Special treaties were often concluded stipulating permanent legations, such as in 1520, for instance, between the King of England and the Emperor of Germany. From the end of the fifteenth century England, France, Spain, and Germany kept up permanent legations at one another's Courts. But it was not until the second half of the seventeenth century that permanent legations became a general institution, the Powers following the example of France under Louis XIV. and Richelieu. It ought to be specially mentioned that Grotius [2] thought permanent legations to be wholy unnecessary. The course of events has, however, shown that Grotius's views as regards permanent legations were short-sighted. Nowadays the Family of Nations could not exist without them, as they are the channel through which nearly the whole, and certainly all important, official intercourse of the States flows.

[1] See Nys, Les Origines du droit international (1894), p. 295.

[2] De jure belli ac pacis, II. c. 28, § 3: "Optimo autem jure rejici possunt, quae nunc in usu sunt, legationes assiduae, quibus cum non sit opus, docet mos antiquus, cui illae ignoratae."

Diplomacy.

§ 359. The rise of permanent legations created the necessity for a new class of State officials, the so-called diplomatists; yet it was not until the end of the eighteenth century that the terms "diplomatist" and "diplomacy" came into general use. And although the art of diplomacy is as old as official intercourse between States, such a special class of officials as are now called diplomatists did not and could not exist until permanent legations had become a general institution. In this as in other cases the office has created the class of men necessary for it. International Law has nothing to do with the education and general character of these officials. Every State is naturally competent to create its own rules, if any, as regards these points. Nor has International Law anything to do with *diplomatic usages*, although these are more or less of importance, as they may occasionally grow into customary rules of International Law. But I would notice one of these usages—namely, that as regards the *language* which is in use in diplomatic intercourse. This language was formerly Latin, but through the political ascendency of France under Louis XIV. it is now French. However, this is a usage of diplomacy only, and not a rule of International Law.[1] Each State can use its own language in all official communications to other States, and States which have the same language regularly do so in their intercourse with each other. But between States of different tongues and, further, at Conferences and Congresses, it is convenient to make use of a language which is generally known. This is nowadays French, but nothing could prevent diplomatists from dropping French at any moment and adopting another language instead.

[1] See Mirus, Das Europäische Gesandtschaftsrecht, I. §§ 266–268.

II

Right of Legation

Grotius, II. c. 18—Vattel, IV. §§ 55-68—Hall, § 98—Phillimore, II. §§ 115-139—Taylor, §§ 285-288—Twiss, §§ 201-202—Wheaton, §§ 206-209—Bluntschli, §§ 159-165—Heffter, § 200—Geffcken in Holtzendorff, III. pp. 620-631—Ullmann, § 35—Rivier, I. § 35—Bonfils, Nos. 658-667—Pradier-Fodéré, II. Nos. 1225-1256—Fiore, II. Nos. 1112-1117—Calvo, III. §§ 1321-1325—Martens, II. §§ 7-8.

Conception of Right of Legation.

§ 360. Right of legation is the right of a State to send and receive diplomatic envoys. The right to send such envoys is termed *active* right of legation, in contradistinction to the *passive* right of legation, as the right to receive such envoys is termed. Some writers[1] on International Law assert that no right but a mere competence to send and receive diplomatic envoys exists according to International Law, maintaining that no State is bound by International Law to send or receive such envoys. But this is certainly wrong in its generality. A State is obviously bound neither to send diplomatic envoys nor to receive *permanent* envoys. On the other hand, the very existence[2] of the Family of Nations makes it necessary for the members or some of the members to negotiate occasionally on certain points. Such negotiation would be impossible in case one member could always and under all circumstances refuse to receive an envoy from the other members. The duty of every member to listen, under ordinary circumstances, to a message from another brought by a diplomatic envoy is, therefore, an outcome of its very membership of the Family of Nations, and this

[1] See, for instance, Wheaton, § 207; Heilborn, System, p. 182.
[2] See above, § 141.

duty corresponds to the right of every member to send such envoys. But the exercise of the active right of legation is discretionary. No State need send diplomatic envoys at all, although practically all States do at least occasionally send such envoys, and most States send permanent envoys to many other States. The passive right of legation is discretionary as regards the reception of *permanent* envoys only.

What States possess the Right of Legation.

§ 361. Not every State, however, possesses the right of legation. Such right pertains chiefly to full-Sovereign States,[1] for other States possess this right under certain conditions only.

(1) Half-Sovereign States, such as States under the suzerainty or the protectorate of another State, can as a rule neither send nor receive diplomatic envoys. Thus, Bulgaria and Egypt are destitute of such right, and the Powers are represented in these States only by consuls or agents without diplomatic character. But there may be exceptions to this rule. Thus, according to the Peace Treaty of Kainardgi of 1774 between Russia and Turkey, the two half-Sovereign principalities of Moldavia and Wallachia had the right of sending Chargés d'Affaires to foreign Powers. Thus, further, the late South African Republic, which was a State under British suzerainty in the opinion of Great Britain, used to keep permanent diplomatic envoys at several foreign States.

(2) Part-Sovereign member States of a Federal State may or may not have the right of legation

[1] It should be emphasised that the Holy See, which is in some respects treated as though an International Person, can send and receive envoys, who must in every respect be considered as though they were diplomatic envoys. That they are actually not diplomatic envoys, although so treated, becomes apparent from the fact that they are not agents for international affairs of States, but exclusively for affairs of the Roman Catholic Church. (See above, § 106.)

besides the Federal State. It is the constitution of the Federal State which regulates this point. Thus, the member-States of Switzerland and of the United States of America have no right of legation, but those of the German Empire certainly have. Bavaria, for example, sends and receives several diplomatic envoys.

Right of Legation by whom exercised

§ 362. As, according to International Law, a State is represented in its international relations by its head, it is he who acts in the exercise of his State's right of legation. But Municipal Law may, just as it designates the person who is the head of the State, impose certain conditions and restrictions upon the head as regards the exercise of such right. And the head himself may, provided that it is sanctioned by the Municipal Law of his State, delegate[1] the exercise of such right to any representative he chooses.

It may, however, in consequence of revolutionary movements, be doubtful who the real head of a State is, and in such cases it remains in the discretion of foreign States to make their choice. But it is impossible for foreign States to receive diplomatic envoys from both claimants to the headship of the same State, or to send diplomatic envoys to both of them. And as soon as a State has recognised the head of a State who came into his position through a revolution, it can no longer keep up diplomatic relations with the former head.

It should be mentioned that a revolutionary party which is recognised as a belligerent Power has nevertheless no right of legation, although foreign States may negotiate with such party in an informal way

[1] See Phillimore, II. §§ 126–133, where several interesting cases of such delegation are discussed.

through political agents without diplomatic character, to provide for the temporal security of the persons and property of their subjects within the territory under the actual sway of such party. Such revolutionary party as is recognised as a belligerent Power is in some points only treated as though it were a subject of International Law; but it is not a State, and there is no reason why International Law should give it the right to send and receive diplomatic envoys.

It should further be mentioned that neither an abdicated nor a deposed head has a right to send and receive diplomatic envoys.[1]

III

Kinds and Classes of Diplomatic Envoys

Vattel, IV. § 69–75—Phillimore, II. §§ 211–224—Twiss, I. §§ 204–209—Heffter, § 208—Geffcken in Holtzendorff, III. pp. 635–646—Calvo, III. §§ 1326–1336—Bonfils, Nos. 668–676—Pradier-Fodéré, III. §§ 1277–1290—Rivier, I. pp. 443–453.

Envoys Ceremonial and Political.

§ 363. Two different kinds of diplomatic envoys are to be distinguished—namely, such as are sent for political negotiations and such as are sent for the purpose of ceremonial function or notification of changes in the headship. For States very often send special envoys to one another on occasion of coronations, weddings, funerals, jubilees, and the like; and it is also usual to send envoys to announce a fresh accession to the throne. Such envoys ceremonial have the same standing as envoys political for real

[1] See Phillimore, II. §§ 124–125, where the case of Bishop Ross, ambassador of Mary Queen of Scots, is discussed.

State negotiations. Among the envoys political, again, two kinds are to be distinguished—namely, first, such as are permanently or temporarily accredited to a State for the purpose of negotiating with such State, and, second, such as are sent to represent the sending State at a Congress or Conference. The latter are not, or need not be, accredited to the State on whose territory the Congress or Conference takes place, but they are nevertheless diplomatic envoys and enjoy all the privileges of such envoys as regards exterritoriality and the like which concern the inviolability and safety of their persons and the members of their suites.

Classes of Diplomatic Envoys.

§ 364. Diplomatic envoys accredited to a State differ in class. These classes did not exist in the early stages of International Law. But during the sixteenth century a distinction between two classes of diplomatic envoys gradually arose, and at about the middle of the seventeenth century, after permanent legations had come into general vogue, two such classes became generally recognised—namely, extraordinary envoys, called Ambassadors, and ordinary envoys, called Residents; Ambassadors being received with higher honours and taking precedence of the other envoys. Disputes arose frequently regarding precedence, and the States tried in vain to avoid them by introducing during the eighteenth century another class—namely, the so-called Ministers Plenipotentiary. At last the Powers assembled at the Vienna Congress came to the conclusion that the matter ought to be settled by an international understanding, and they agreed, therefore, on March 19, 1815, upon the establishment of three different classes—namely, first, Ambassadors; second, Ministers Plenipotentiary and Envoys Extraordinary; third, Chargés d'Affaires. And

the five Powers assembled at the Congress of Aix-la-Chapelle in 1818 agreed upon a fourth class—namely, Ministers Resident, to rank between Ministers Plenipotentiary and Chargés d'Affaires. All the other States either expressly or tacitly accepted these arrangements, so that nowadays the four classes are an established order. Although their privileges are materially the same, they differ in rank and honours, and they must therefore be treated separately.

Ambassadors.

§ 365. Ambassadors form the first class. Only States enjoying royal honours [1] are entitled to send and to receive Ambassadors, as also is the Holy See, whose first-class envoys are called *Nuncios*, or *Legati a latere* or *de latere*. Ambassadors are considered to be personal representatives of the heads of their States and enjoy for this reason special honours. Their chief privilege —namely, that of negotiating with the head of the State personally—has, however, little value nowadays, as almost all the States have constitutional government to a certain extent, which necessitates that all the important business should go through the hands of a Foreign Secretary.

Ministers Plenipotentiary and Envoys Extraordinary.

§ 366. The second class, the Ministers Plenipotentiary and Envoys Extraordinary, to which also belong the Papal Internuncios, are not considered to be personal representatives of the heads of their States. Therefore they do not enjoy all the special honours of the Ambassadors, and have not the privilege of treating with the head of the State personally. But otherwise there is no difference between these two classes.

Ministers Resident.

§ 367. The third class, the Ministers Resident, enjoy fewer honours and rank below the Ministers Plenipotentiary. But beyond the fact that Ministers

[1] See above, § 117, No. 1.

Resident do not enjoy the title "Excellency," there is no difference between them and the Ministers Plenipotentiary.

Chargés d'Affaires.

§ 368. The fourth class, the Chargés d'Affaires, differs chiefly in one point from the first, second, and third class—namely, in so far as its members are accredited from Foreign Office to Foreign Office, whereas the members of the other classes are accredited from head of State to head of State. The Chargés d'Affaires enjoy, therefore, much less honours than the other diplomatic envoys. It must be specially mentioned that a distinction is made between a Chargé d'Affaires and a Chargé des Affaires. The latter is a member of a legation whom the head of the legation delegates for the purpose of taking his place during his absence on leave. Such a Chargé des Affaires ranks below the Chargés d'Affaires.

The Diplomatic Corps.

§ 369. All the Diplomatic Envoys accredited to the same State form, according to a diplomatic usage, a body which is styled the "Diplomatic Corps." The head of this body, the so-called "Doyen," is the Papal Nuncio, or, in case there is no Nuncio accredited, the oldest Ambassador, or, failing Ambassadors, the oldest Minister Plenipotentiary, and so on. As the Diplomatic Corps is not a body legally constituted, it performs no legal functions, but it is nevertheless of great importance, as it watches over the privileges and honours due to diplomatic envoys.

IV

Appointment of Diplomatic Envoys

Vattel, IV. §§ 76–77—Phillimore, II. §§ 227–231—Twiss, I. §§ 212–214—Ullmann, § 38—Calvo, III. §§ 1343–1345—Bonfils, Nos. 677–680—Wheaton, §§ 217–220.

Person and Qualification of the Envoy.

§ 370. International Law has no rules as regards the qualification of the individuals whom a State can appoint as diplomatic envoys, the States being naturally competent to act according to discretion, although of course there are many qualifications a diplomatic envoy must possess to fill his office successfully. The Municipal Laws of many States comprise, therefore, many details as regards the knowledge and training which a candidate for a permanent diplomatic post must possess, whereas regarding envoys ceremonial even the Municipal Laws have no provisions at all. The question is sometimes discussed whether females[1] might be appointed envoys. History relates a few cases of female diplomatists. Thus, for example, Louis XIV. of France accredited in 1646 Madame de Guébriant ambassador to the Court of Poland. During the last two centuries, however, no such case has to my knowledge occurred, although I doubt not that International Law does not prevent a State from sending a female as diplomatic envoy. But under the present circumstances many States would refuse to receive her.

Letter of Credence, Full Powers, Passports.

§ 371. The appointment of an individual as a diplomatic envoy is announced to the State to which he is accredited in certain official papers to be handed in by the envoy to the receiving State. *Letter of*

[1] See Mirus, Das europäische Gesandtschaftsrecht, I. §§ 127–128, and Phillimore, II. § 134.

Credence is the designation of the document in which the head of the State accredits a permanent ambassador or minister to a foreign State. Every such envoy receives a sealed Letter of Credence and an open copy. As soon as the envoy has arrived at the place of his designation, he sends the copy to the Foreign Office to make his arrival officially known. The sealed original, however, is handed in personally by the envoy to the head of the State to whom he is accredited. Chargés d'Affaires receive a Letter of Credence too, but as they are accredited from Foreign Office to Foreign Office, their Letter of Credence is signed, not by the head of their home State, but by its Foreign Office. Now a permanent diplomatic envoy needs no other empowering document in case he is not entrusted with any task outside the limits of the ordinary business of a permanent legation. But in case he is entrusted with any such task, as, for instance, if any special treaty or convention is to be negotiated, he requires a special empowering document—namely, the so-called *Full Powers* (*Pleins Pouvoirs*). They are given in Letters Patent signed by the head of the State, and they are either limited or unlimited Full Powers, according to the requirements of the case. Such diplomatic envoys as are sent, not to represent their home State permanently, but on an extraordinary mission such as representation at a Congress, negotiation of a special treaty, and other transactions, receive Full Powers only, and no Letter of Credence. Every permanent or other diplomatic envoy is also furnished with so-called *Instructions* for the guidance of his conduct as regards the objects of his mission. But such Instructions are a matter between the Envoy and his home State exclusively, and they have therefore, although they

may otherwise be very important, no importance for International Law. Every permanent diplomatic envoy receives, lastly, *Passports* for himself and his suite specially made out by the Foreign Office. These Passports the envoy after his arrival deposits at the Foreign Office of the State to which he is accredited, where they remain until he himself asks for them because he desires to leave his post, or until they are returned to him on his dismissal.

Combined Legations.

§ 372. As a rule, a State appoints different individuals as permanent diplomatic envoys to different States, but sometimes a State appoints the same individual as permanent diplomatic envoy to several States. As a rule, further, a diplomatic envoy represents one State only. But occasionally several States appoint the same individual as their envoy, so that one envoy represents several States.

Appointment of several Envoys.

§ 373. In former times States used frequently[1] to appoint more than one permanent diplomatic envoy as their representative in a foreign State. Although this would hardly occur nowadays, there is no rule against such a possibility. And even now it happens frequently that States appoint several envoys for the purpose of representing them at Congresses and Conferences. In such cases one of the several envoys is appointed senior, to whom the others are subordinate.

[1] See Mirus, l. c. I. §§ 117–119

V

Reception of Diplomatic Envoys

Vattel, IV. §§ 65-67—Hall, § 98—Phillimore, II. §§ 133-139—Twiss, I. §§ 202-203—Taylor, §§ 285-290—Martens, II. § 8—Calvo, III. §§ 1353-1356—Pradier-Fodéré, III. §§ 1253-1260—Fiore, II. Nos. 1118-1120—Rivier, I. pp. 455-457.

Duty to receive Diplomatic Envoys.

§ 374. Every member of the Family of Nations that possesses the passive right of legation is under ordinary circumstances bound to receive diplomatic envoys accredited to itself from other States for the purpose of negotiation. But the duty extends neither to the reception of permanent envoys nor to the reception of temporary envoys under all circumstances.

(1) As regards permanent envoys, it is a generally recognised fact that a State is as little bound to receive them as it is to send them. Practically, however, every full-Sovereign State which desires its voice to be heard among the States receives and sends permanent envoys, as without such it would, under present circumstances, be impossible for a State to have any influence whatever in international affairs. It is for this reason that Switzerland, which in former times abstained entirely from sending permanent envoys, has abandoned her former practice and nowadays sends and receives several. The insignificant Principality of Lichtenstein is, as far as I know, the only full-Sovereign State which neither sends nor receives one single permanent legation.

But a State may receive a permanent legation from one State and refuse to do so from another. Thus, the Protestant States never *received* a permanent

legation from the Popes, even when the latter were heads of a State, and they still observe this rule, although one or another of them, such as Prussia for example, keeps a permanent legation at the Vatican.

(2) As regards temporary envoys, it is likewise a generally recognised fact among those writers who assert the duty of a State to receive under ordinary circumstances temporary envoys that there are exceptions to that rule. Thus, for example, a State which knows beforehand the object of a mission and does not wish to negotiate thereon can refuse to receive the mission. Thus, further, a belligerent can refuse[1] to receive a legation from the other belligerent, as war involves the rupture of all peaceable relations.

Refusal to receive a certain Individual.

§ 375. But the refusal to receive an envoy must not be confounded with the refusal to receive a certain individual as envoy. A State may be ready to receive a permanent or temporary envoy, but may object to the individual selected for that purpose. International Law gives no right to a State to insist upon the reception of such individual appointed by it as diplomatic envoy. Every State can refuse to receive as envoy a person objectionable to itself. And a State refusing an individual envoy is neither compelled to specify what kind of objection it has, nor to justify its objection. Thus, for example, most States refuse to receive one of their own subjects as an envoy from a foreign State.[2] Thus, again, the King

[1] But this is not generally recognised. See Vattel, IV. § 67; Phillimore, II. § 138; and Pradier-Fodéré, III. No. 1255.

[2] In case a State receives one of its own subjects as diplomatic envoy of a foreign State, it has to grant him all the privileges of such envoys, including exterritoriality. See *Macartney* v. *Garbutt*, L.R., 24 Q.B.D., 368. Article 15 of the Règlement sur les Immunités Diplomatiques, adopted in 1895 by the Institute of International

of Hanover refused in 1847 to receive a minister appointed by Prussia, because the individual was of the Roman Catholic faith. Italy refused in 1885 to receive Mr. Keiley as ambassador of the United States of America because he had in 1871 protested against the annexation of the Papal States. And when the United States sent the same gentleman as ambassador to Austria, the latter refused him reception on the ground that his wife was said to be a Jewess. Although, as is apparent from these examples, no State has a right to insist upon the reception of a certain individual as envoy, in practice States are often offended when reception is refused. Thus, in 1832 England did not cancel for three years the appointment of Sir Stratford Canning as ambassador to Russia, although the latter refused reception, and the post was practically vacant. In 1885, when, as above mentioned, Austria refused reception to a certain ambassador of the United States, the latter did not appoint another, although the rejected individual resigned, and the legation was for several years left to the care of a Chargé d'Affaires. To avoid such conflicts it is the good practice of many States never to appoint an individual as envoy without having ascertained beforehand whether the individual would be *persona grata*. And it is a customary rule of International Law that a State which does not object to the appointment of a certain individual, although its opinion has been asked beforehand, is bound to receive such individual.

Mode and Solemnity of Reception.

§ 376. In case a State does not object to the reception of a person as diplomatic envoy accredited to itself, his actual reception takes place as soon as he

Law (see Annuaire, XIV. p. 244), denies, however, to such an individual exemption from jurisdiction. See Phillimore, II. § 135, and Twiss, I. § 203.

has arrived at the place of his designation. But the mode of reception differs according to the class the envoy belongs to. If he be one of the first, second, or third class, it is the duty of the head of the State to receive him solemnly in a so-called public audience with all the usual ceremonies. For that purpose the envoy sends a copy of his credentials to the Foreign Office, which arranges a special audience with the head of the State for the envoy, when he delivers in person his sealed credentials.[1] If the envoy be a Chargé d'Affaires only, he is received in audience by the Secretary of Foreign Affairs, to whom he hands his credentials. Through the formal reception the envoy becomes officially recognised and can officially commence to exercise his functions. But such of his privileges as exterritoriality and the like, which concern the safety and inviolability of his person, he must be granted even before his official reception, as his character as diplomatic envoy is considered to date, not from the time of his official reception, but from the time when his credentials were handed to him on leaving his home State, his passports furnishing sufficient proof of his diplomatic character.

Reception of Envoys to Congresses and Conferences.

§ 377. It must be specially observed that all these details regarding the reception of diplomatic envoys accredited to a State do not apply to the reception of envoys sent to represent different States at a Congress or Conference. As such envoys are not accredited to the State on whose territory the Congress or Conference takes place, such State has no competence to refuse the reception of the appointed envoys, and no formal and official reception of the latter by the head of the State takes place. The

[1] Details concerning reception of envoys are given by Twiss, I. § 215, and Rivier, I. p. 467.

appointing States merely notify the appointment of their envoys to the Foreign Office of the State on whose territory the transactions take place, the envoys call upon the Foreign Secretary after their arrival to introduce themselves, and they are courteously received by him. They do not, however, hand in to him their Full Powers, but reserve them for the first meeting of the Congress or Conference, where they produce them in exchange with one another.

VI

Functions of Diplomatic Envoys

Rivier, I. § 37—Ullmann, § 39—Bonfils, Nos. 681-683—Pradier-Fodéré, III. §§ 1346-1376.

On Diplomatic Functions in general.

§ 378. A distinction must be made between functions of permanent envoys and of envoys for temporary purposes. The functions of the latter, who are either envoys ceremonial or such envoys political as temporarily only are accredited for the purpose of some definite negotiations or as representatives at Congresses and Conferences, are clearly demonstrated by the very purpose of their appointment. It is the functions of the permanent envoys which demand a closer consideration. These regular functions may be grouped together under the heads of negotiation, observation, and protection. But besides these regular functions a diplomatic envoy may be charged with other miscellaneous functions.

Negotiation.

§ 379. A permanent ambassador or other envoy represents his home State in the totality of its international relations not only with the State to which he is accredited, but also with other States. He is the

mouthpiece of the head of his home State and its Foreign Secretary as regards communications to be made to the State to which he is accredited. He likewise receives communications from the latter and reports them to his home State. In this way not only are international relations between these two States fostered and negotiated upon, but such international affairs of other States as are of general interest to all or a part of the members of the Family of Nations are also discussed. Owing to the fact that all the more important Powers keep permanent legations accredited to one another, a constant exchange of views in regard to affairs international is taking place between them.

Observation.

§ 380. But these are not all the functions of permanent diplomatic envoys. Their task is, further, to observe attentively every occurrence which might affect the interest of their home States, and to report such observations to their Governments. It is through these reports that every member of the Family of Nations is kept well informed in regard to the army and navy, the finances, the public opinion, the commerce and industry of foreign countries. And it must be specially emphasised that no State that receives diplomatic envoys has a right to prevent them from exercising their function of observation.

Protection.

§ 381. A third task of diplomatic envoys is the protection of the persons, property, and interests of such subjects of their home States as are within the boundaries of the State to which they are accredited. If such subjects are wronged without being able to find redress in the ordinary way of justice, and ask the help of the diplomatic envoy of their home State, he must be allowed to afford them protection. It is for the Municipal Law and regulations of his home

State, and not for International Law, to prescribe to an envoy the limits within which he has to afford protection to his compatriots.

Miscellaneous Functions.

§ 382. Negotiation, observation, and protection are tasks common to all diplomatic envoys of every State. But a State may order its permanent envoys to perform other tasks, such as the registration of deaths, births, and marriages of subjects of the home State, legalisation of their signatures, making out of passports for them, and the like. But in doing this a State must be careful not to order its envoys to perform such tasks as are by the law of the receiving State exclusively reserved to its own officials. Thus, for instance, a State whose laws compel persons who intend marriage to conclude it in presence of its registrars, need not allow a foreign envoy to legalise a marriage of compatriots before its registration by the official registrar. So, too, a State need not allow a foreign envoy to perform an act which is reserved for its jurisdiction, as, for instance, the examination of witnesses on oath.

Envoys not to interfere in Internal Politics.

§ 383. But it must be specially emphasised that envoys must not interfere with the internal political life of the State to which they are accredited. It certainly belongs to their functions to watch the political events and the political parties with a vigilant eye and to report their observations to their home States. But they have no right whatever to take part in that political life itself, to encourage a certain political party, or to threaten another. If nevertheless they do so, they abuse their position. And it matters not whether an envoy acts thus on his own account or on instructions from his home State. No strong self-respecting State will allow a foreign envoy to exercise such interference, but will either

request his home State to recall him and appoint another individual in his place or, in case his interference is very flagrant, hand him his passports and therewith dismiss him. History records many instances of this kind,[1] although in many cases it is doubtful whether the envoy concerned really abused his office for the purpose of interfering with internal politics.

VII

Position of Diplomatic Envoys

Diplomatic Envoys objects of International Law.

§ 384. Diplomatic envoys are just as little subjects of International Law as heads of States are; and the arguments regarding the position of such heads[2] must also be applied to the position of diplomatic envoys, which is given to them by International Law not as individuals but as representative organs of their States. It is derived, not from personal rights, but from rights and duties of their home States and the receiving States. All the privileges which are possessed by diplomatic envoys according to International Law are not rights given to them by International Law, but rights given by the Municipal Law of the receiving States in compliance with an international right of their home States. For International Law gives a right to every State to demand for its diplomatic envoys certain privileges from the Municipal Law of a foreign State. Thus, a diplomatic envoy is not a subject but an

[1] See Hall (§ 98**) and Taylor (§ 322), who both discuss a number of cases, especially that of Lord Sackville, who received his passports in 1888 from the United States of America for an alleged interference in the Presidential election.

[2] See above, § 344.

object of International Law, and in this regard like any other individual.

Privileges due to Diplomatic Envoys.

§ 385. Privileges due to diplomatic envoys, apart from ceremonial honours, have reference to their inviolability and to their so-called exterritoriality. The reasons why these privileges must be granted are that diplomatic envoys are representatives of States and of their dignity,[1] and, further, that they could not exercise their functions perfectly unless they enjoyed such privileges. For it is obvious that, were they liable to ordinary legal and political interference like other individuals and thus more or less dependent on the good-will of the Government, they might be influenced by personal considerations of safety and comfort to such a degree as would materially hamper the exercise of their functions. It is equally clear that liability to interference with their full and free intercourse with their home States through letters, telegrams, and couriers would wholly nullify their *raison d'être*. In this case it would be impossible for them to send independent and secret reports to or receive similar instructions from their home States. From the consideration of these and various cognate reasons their privileges seem to be inseparable attributes of the very existence of diplomatic envoys.[2]

[1] See above, § 121.

[2] The Institute of International Law, at its meeting at Cambridge in 1895, discussed the privileges of diplomatic envoys, and drafted a body of seventeen rules in regard thereto. (See Annuaire, XIV. p. 240.)

VIII

Inviolability of Diplomatic Envoys

Vattel, IV. §§ 80–107—Hall, §§ 50, 98*—Phillimore, II. §§ 154–175—Twiss, I. §§ 216–217—Ullmann, § 40—Geffcken in Holtzendorff, III. pp. 648–654—Rivier, I. § 38—Bonfils, Nos. 684–699—Pradier-Fodéré, III. §§ 1382–1393—Fiore, II. Nos. 1127–1143—Calvo, III. §§ 1480–1498—Martens, II. § 11—Crouzet, "De l'inviolabilité . . . des agents diplomatiques" (1875).

Protection due to Diplomatic Envoys.

§ 386. Diplomatic envoys are just as sacrosanct as heads of States. They must, therefore, on the one hand, be afforded special protection as regards the safety of their persons, and, on the other hand, they must be exempted from every kind of criminal jurisdiction of the receiving States. Now the protection due to diplomatic envoys must find its expression not only in the necessary police measures for the prevention of offences, but also in specially severe punishments to be inflicted on offenders. Thus, according to English Criminal Law,[1] every one is guilty of a misdemeanour who, by force or personal restraint, violates any privilege conferred upon the diplomatic representatives of foreign countries, or who[2] sets forth or prosecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign country or the person of a servant of any such representative is arrested or imprisoned. The protection of diplomatic envoys is not restricted to their own person, but must be extended to the members of their family and suite, to their official residence, their furniture, carriages, papers, and likewise to their intercourse with their home States by letters, telegrams, and special messengers.

[1] See Stephen's Digest, articles 96–97.
[2] 7 Anne, c. XII. §§ 3–6.

Exemption from Criminal Jurisdiction.

§ 387. As regards the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of International Law agree nowadays[1] upon the fact that the receiving States have no right, under any circumstances whatever, to prosecute and punish diplomatic envoys. But the question is not settled among writers on International Law whether the commands and injunctions of the laws of the receiving States concern diplomatic envoys at all, so that the latter have to comply with such commands and injunctions, although the fact is established that they can never be prosecuted and punished for any breach.[2] This question ought to be decided in the negative, for a diplomatic envoy must in no point be considered under the legal authority of the receiving State. But this does not mean that a diplomatic envoy must have a right to do what he likes. The presupposition of the privileges he enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the Municipal Law as do not restrict him in the effective exercise of his functions. In case he acts and behaves otherwise, and disturbs thereby the internal order of the State, the latter will certainly request his recall or send him back at once.

History records many cases of diplomatic envoys who have conspired against the receiving States, but have nevertheless not been prosecuted. Thus, in 1584, the Spanish Ambassador Mendoza in England

[1] In former times there was no unanimity among publicists. (See Phillimore, II. § 154.)

[2] The point is thoroughly discussed by Beling, "Die strafrechtliche Bedeutung der Exterritorialität" (1896), pp. 71–90.

plotted to depose Queen Elizabeth; he was ordered to leave the country. In 1587 the French Ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth; he was simply warned not to commit a similar act again. In 1654 the French Ambassador in England, De Bass, conspired against the life of Cromwell; he was ordered to leave the country within twenty-four hours.[1]

Limitation of Inviolability.

§ 388. As diplomatic envoys are sacrosanct, the principle of their inviolability is generally recognised. But there is one exception. For if a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or in case he conspires against the receiving State and the conspiracy can be made futile only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home. Thus in 1717 the Swedish Ambassador Gyllenburg in London, who was an accomplice in a plot against King George I., was arrested and his papers were searched. In 1718 the Spanish Ambassador Prince Cellamare in France was placed in custody because he organised a conspiracy against the French Government.[2] And it must be emphasised that a diplomatic envoy cannot make it a point of complaint if injured in consequence of his own unjustifiable behaviour, as for instance in attacking an individual who in self-defence retaliates, or in unreasonably or wilfully placing himself in dangerous or awkward positions, such as in a disorderly crowd.[3]

[1] These and other cases are discussed by Phillimore, II. §§ 160–165.

[2] Details regarding these cases are given by Phillimore, II. §§ 166 and 170.

[3] See article 6 of the rules regarding diplomatic immunities

IX

Exterritoriality of Diplomatic Envoys

Vattel, IV. §§ 80–119—Hall, §§ 50, 52, 53—Westlake, I. pp. 263–273—Phillimore, II. §§ 176–210—Taylor, §§ 299–315—Twiss, I. §§ 217–221—Ullmann, § 40—Geffcken in Holtzendorff, III. pp. 654–659—Rivier, I. 38—Bonfils, Nos. 700–721—Pradier-Fodéré, III. §§ 1396–1495—Fiore, II. Nos. 1145–1163—Calvo, III. §§ 1499–1531—Martens, II. §§ 12–14—Gottschalck, "Die Exterritorialität der Gesandten" (1878)—Heyking, "L'exterritorialité" (1889)—Odier, "Des privilèges et immunités des agents diplomatiques" (1890)—Vercamer, "Des franchises diplomatiques et spécialement de l'exterritorialité" (1891)—Droin, "L'exterritorialité des agents diplomatiques" (1895).

Reason and Fictional Character of Exterritoriality.

§ 389. The exterritoriality which must be granted to diplomatic envoys by the Municipal Laws of all the members of the Family of Nations is not, as in the case of sovereign heads of States, based on the principle *par in parem non habet imperium*, but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, the control, and the like of the receiving States. Exterritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term "Exterritoriality" is nevertheless valuable, because it demonstrates clearly the fact that envoys must in most points be treated as though they were not within the territory of the receiving States.[1] And the so-called exterritoriality of envoys is actualised by a body of privileges which must be severally discussed.

adopted by the Institute of International Law at its meeting at Cambridge in 1895 (Annuaire, XIV. p. 240).

[1] With a few exceptions (see Droin, L'exterritorialité des agents diplomatiques (1895), pp. 32–43), all publicists accept the term and the fiction of exterritoriality.

Immunity of Domicile.

§ 390. The first of these privileges is immunity of domicile, the so-called *Franchise de l'hôtel.* The present immunity of domicile has developed from the former condition of things, when the official residences of envoys were in every point considered to be outside the territory of the receiving States, and when this exterritoriality was in many cases even extended to the whole quarter of the town in which such a residence was situated. One used then to speak of a *Franchise du quartier* or the *Jus quarteriorum.* And an inference from this *Franchise du quartier* was the so-called right of asylum, the envoys claiming the right to grant asylum within the boundaries of their residential quarters to every individual who took refuge there.[1] But already in the seventeenth century most States opposed this *Franchise du quartier*, which totally disappeared in the eighteenth century, leaving behind, however, the claim of the envoys to grant asylum within their official residences. Thus, when in 1726 the Duke of Ripperda, first Minister to Philip V. of Spain, who was accused of high treason and had taken refuge in the residence of the English ambassador in Madrid, was forcibly arrested there by order of the Spanish Government, the British Government complained of this act as a violation of International Law.[2] Twenty-one years later, in 1747, occurred a similar case in Sweden. A merchant named Springer was accused of high treason and took refuge in the house of the English ambassador at Stockholm. On the refusal of the English

[1] Although this right of asylum was certainly recognised by the States in former centuries, it is of interest to state that Grotius did not consider it postulated by International Law, for he says of this right (II. c. 18, § 8): "Ex concessione pendet ejus apud quem agit. Istud enim juris gentium non est." See also Bynkershoek, De foro legat. c. 21.

[2] See Martens, Causes Célèbres, I. p. 178.

envoy to surrender Springer, the Swedish Government surrounded the embassy with troops and ordered the carriage of the envoy, when leaving the embassy, to be followed by mounted soldiers. At last Springer was handed over to the Swedish Government under protest, but England complained and called back her ambassador, as Sweden refused to make the required reparation.[1] As these two examples show, the right of asylum, although claimed and often conceded, was nevertheless not universally recognised. During the nineteenth century all remains of it vanished, and when in 1867 the French envoy in Lima claimed it, the Peruvian Government refused to concede it.

Nowadays the official residences of envoys are *in a sense and for some points only* considered as though they were outside the territory of the receiving States. For the immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to the officers of justice, police, revenue, and the like, of the receiving States without the special consent of the respective envoys. Therefore, no act of jurisdiction or administration of the receiving Governments can take place within these residences, except by special permission of the envoys. And the stables and carriages of the envoys are considered to be parts of their residences. But such immunity of domicile is granted only in so far as it is necessary for the independence and inviolability of the envoys and the inviolability of their official documents and archives. If an envoy abuses this immunity, the receiving Government need not bear it passively. There is, therefore, no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals or to other

[1] See Martens, Causes Célèbres, II. p. 52.

individuals not belonging to his suite.[1] Of course, an envoy need not deny the entrance to criminals who want to take refuge in the embassy. But he must surrender them to the prosecuting Government at its request, and, if he refuses, any measures may be taken to induce him to do so, apart from such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and eventually the criminal may even forcibly be taken out of the embassy. But such measures of force are justifiable only if the case is an urgent one, and after the envoy has in vain been required to surrender the criminal. Further, if a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of exterritoriality, the criminal must be surrendered to the local Government. The case of Nikitschenkow, which occurred in Paris in 1867, is an instance thereof. Nikitschenkow, a Russian subject not belonging to the Russian Embassy, made an attempt on and wounded a member of that embassy within its official residence. The French police were called in and arrested the criminal. The Russian Government required his extradition, maintaining that, as the crime was committed inside the Russian Embassy, it fell exclusively under Russian jurisdiction; but the French Government refused extradition and Russia dropped her claim.

Again, an envoy has no right to seize a subject of his home State who is within the boundaries of the receiving State and keep him under arrest inside the embassy with the intention of bringing him away

[1] But according to Hall (§ 52) the custom of granting asylum to political refugees in the houses of the envoys still exists in the Spanish-American Republics. See also Westlake, I. p. 272, and Moore, Asylum in Legations and Consulates, and in Vessels (1892).

into the power of his home State. An instance thereof is the case of the Chinaman Sun Yat Sen which occurred in London in 1896. This was a political refugee from China living in London. He was induced to enter the house of the Chinese Legation and kept under arrest there in order to be conveyed forcibly to China, the Chinese envoy contending that, as the house of the legation was Chinese territory, the English Government had no right to interfere. But the latter did interfere, and Sun Yat Sen was released after several days.

Exemption from Criminal and Civil Jurisdiction.

§ 391. The second privilege of envoys in reference to their exterritoriality is their exemption from criminal and civil jurisdiction. As their exemption from criminal jurisdiction is also a consequence of their inviolability, it has already been discussed,[1] and we have here to deal with their exemption from civil jurisdiction only. No civil action of any kind can be brought against them in the Civil Courts of the receiving States as regards debts and the like. They cannot be arrested for debts, nor can their furniture, their carriages, their horses, and the like, be seized for debts. They cannot be prevented from leaving the country for not having paid their debts, nor can their passports be refused to them on the same account. Thus, when in 1772 the French Government refused the passports to Baron de Wrech, the envoy of the Landgrave of Hesse-Cassel at Paris, for not having paid his debts, all the other envoys in Paris complained of this act of the French Government as a violation of International Law.[2] But the rule that an envoy is exempt from the civil jurisdiction has

[1] See above, §§ 387–388.
[2] See Martens, Causes Célèbres, II. p. 110.

certain exceptions. If an envoy enters an appearance to an action against himself, further, if he himself brings an action under the jurisdiction of the receiving State, the courts of the latter have civil jurisdiction in such cases over the envoy. And the same is valid as regards real property held within the boundaries of the receiving State by an envoy, not in his official character, but as a private individual, and as regards mercantile [1] ventures he might engage in on the territory of the receiving State.

Exemption from Subpœna as witness.

§ 392. The third privilege of envoys in reference to their exterritoriality is exemption from subpœna as witnesses. No envoy can be obliged, or even required, to appear as a witness in a civil or criminal or administrative Court, nor is an envoy obliged to give evidence before a Commissioner sent to his house. If, however, an envoy chooses for himself to appear as a witness or to give evidence of any kind, the Courts can make use of such evidence. A remarkable case of this kind is that of the Dutch envoy Dubois in Washington, which happened in 1856. A case of homicide occurred in the presence of M. Dubois, and, as his evidence was absolutely necessary for the trial, the Foreign Secretary of the United States asked Dubois to appear before the Court as a witness, recognising the fact that Dubois had no duty to do so. When Dubois, on the advice of all the other diplomatic envoys in Washington, refused to comply with this desire, the United States brought the matter before the Dutch Government. The latter, however, approved of Dubois' refusal, but authorised him to give evidence under oath before the American

[1] English Municipal Law grants, however, even in such cases, exemption from local jurisdiction to foreign envoys. (See Westlake, I. p. 267.)

Foreign Secretary. As, however, such evidence would have had no value at all according to the local law, Dubois' evidence was not taken, and the Government of the United States asked the Dutch Government to recall him.[1]

Exemption from Police.

§ 393. The fourth privilege of envoys in reference to their exterritoriality is exemption from the police of the receiving States. Orders and regulations of the police do in no way bind them. On the other hand, this exemption from police does not contain the privilege of an envoy to do what he likes as regards matters which are regulated by the police. Although such regulations can in no way bind him, an envoy enjoys the privilege of exemption from police under the presupposition that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is, therefore, expected to comply voluntarily with all such commands and injunctions of the local police as, on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community. Of course, he cannot be punished if he acts otherwise, but the receiving Government may request his recall or even be justified in other measures of such a kind as do not injure his inviolability. Thus, for instance, if in time of plague an envoy were not voluntarily to comply with important sanitary arrangements of the local police, and if there were great danger in delay, a case of necessity would be created and the receiving Government would be justified in the exercise of reasonable pressure upon the envoy.

§ 394. The fifth privilege of envoys in reference to

[1] See Wharton, I. § 98, and Calvo, III. § 1520.

Exemption from Taxes and the like.

their exterritoriality is exemption from taxes and the like. As an envoy, through his exterritoriality, is considered not to be subjected to the territorial supremacy of the receiving State, he must be exempt from all direct personal taxation and therefore need not pay either income-tax or other direct taxes. As regards rates, it is necessary to draw a distinction. Payment of rates imposed for local objects from which an envoy himself derives benefit, such as sewerage, lighting, water, night-watch, and the like, can be required of the envoy, although this is often[1] not done. Other rates, however, such as poor-rates and the like, he cannot be requested to pay. As regards customs duties, International Law does not claim the exemption of envoys therefrom. Practically and by courtesy, however, the Municipal Laws of many States allow diplomatic envoys within certain limits the entry free of duty of goods intended for their own private use. If the house of an envoy is the property of his home State or his own property, the house need not be exempt from property tax, although it is often so by the courtesy of the receiving State. Such property tax is not a personal and direct, but an indirect tax.

Right of Chapel.

§ 395. A sixth privilege of envoys in reference to their exterritoriality is the so-called Right of Chapel (*Droit de chapelle* or *Droit du culte*). This is the privilege of having a private chapel for the practice of his own religion, which must be granted to an envoy by the Municipal Law of the receiving State. A privilege of great worth in former times, when

[1] "It has been held in England that the payment of local rates cannot be enforced by suit or distress against a member of a mission." says Westlake, I. p. 268, who quotes the cases of *Parkinson* v. *Potter* (16 Q.B. 152) and *Macartney* v. *Garbut* (L. R., 24 Q.B.D. 368).

freedom of religious worship in most States was unknown, it has at present an historical value only. But it has not disappeared, and might become again of actual importance in case a State should in the future give way to reactionary intolerance. It must, however, be emphasised that the right of chapel must only comprise the privilege of religious worship in a private chapel inside the official residence of the envoy. No right of having and tolling bells need be granted. The privilege includes the office of a chaplain, who must be allowed to perform every religious ceremony within the chapel, such as baptism and the like. It further includes permission to all the compatriots of the envoy, even if they do not belong to his retinue, to take part in the service. But the receiving State need not allow its own subjects to take part therein.

Self-jurisdiction.

§ 396. The seventh and last privilege of envoys in reference to their exterritoriality is self-jurisdiction within certain limits. As the members of his retinue are considered exterritorial, the receiving State has no jurisdiction over them, and the home State may therefore delegate such civil and criminal jurisdiction to the envoy. But no receiving State is required to grant self-jurisdiction to an ambassador beyond a certain reasonable limit. Thus, an envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like. But no civilised State would nowadays allow an envoy himself to try a member of his retinue. This was done in former centuries. Thus, in 1603, Sully, who was sent by Henri IV. of France on a special mission to England, called together a

French jury in London and had a member of his retinue condemned to death for murder. The convicted man was handed over for execution to the English authorities, but James I. reprieved him.[1]

X

Position of Diplomatic Envoys as regards Third States

Vattel, IV. §§ 84-86—Hall, §§ 99-101—Phillimore, II. §§ 172-175—Taylor, §§ 293-295—Twiss, I. § 222—Wheaton, §§ 242-247—Ullmann, § 42—Geffcken in Holtzendorff, III. pp. 665-668—Heffter, § 207—Rivier, § 39—Pradier-Fodéré, III. § 1394—Fiore, II. Nos. 1143-1144—Calvo, III. §§ 1532-1539.

Possible Cases.

§ 397. Although, when an individual is accredited as diplomatic envoy by one State to another, these two States only are directly concerned in his appointment, the question must be discussed, what position such envoy has as regards third States in those cases in which he comes in contact with them. Several such cases are possible. An envoy may, first, travel through the territory of a third State to reach the territory of the receiving State. Or, an envoy accredited to a belligerent State and living on the latter's territory may be found there by the other belligerent who militarily occupies such territory. And, lastly, an envoy accredited to a certain State might interfere with the affairs of a third State.

Envoy travelling through Territory of third State.

§ 398. If an envoy travels through the territory of a third State incognito or for his pleasure only, there is no doubt that he cannot claim any special privileges whatever. He is in exactly the same position as any other foreign individual travelling

[1] See Martens, Causes Célèbres, I. p. 391. See also the two cases reported by Calvo, III. § 1545.

on this territory, although by courtesy he might be treated with particular attention. But matters are different when an envoy on his way from his own State to the State of his destination travels through the territory of a third State. If the sending and the receiving States are not neighbours, the envoy probably has to travel through the territory of a third State. Now, as the institution of legation is a necessary one for the intercourse of States and is firmly established by International Law, there ought to be no doubt whatever that such third State must grant the right of innocent passage (*jus transitus innoxii*) to the envoy, provided that it is not at war with the sending or the receiving State. But no other privileges,[1] especially those of inviolability and exterritoriality need be granted to the envoy. And the right of innocent passage does not include the right to stop on the territory longer than is necessary for the passage. Thus, in 1854, the French Government did not allow the United States envoy, Soulié, who had landed at Calais on his way to Madrid, to stop in France, because he was a French refugee naturalised in the United States.[2] And it must be specially remarked that no right of passage need be granted if the third State is at war with the sending or receiving State. The envoy of a belligerent, who travels through the territory of the other belligerent to reach the place of his destination, may be seized and treated as a prisoner of war. Thus, in 1744, when the French Ambassador, Maréchal de Belle-Isle, on his way to Berlin, passed through the territory of Hanover, which country was then, together with

[1] The matter, which has always been disputed, is fully discussed by Twiss, I. § 222, who also quotes the opinion of Grotius, Bynkershoek, and Vattel.

[2] See Wharton, I. § 97.

England, at war with France, he was made a prisoner of war and sent to England.

Envoy found by Belligerent on occupied Enemy Territory.

§ 399. When in time of war a belligerent occupies the capital of an enemy State and finds there envoys of other States, these envoys do not lose their diplomatic privileges as long as the State to which they are accredited is in existence. As military occupation does not extinguish a State subjected thereto, such envoys do not cease to be envoys. On the other hand, they are not accredited to the belligerent who has taken possession of the territory by military force, and the question is not settled yet by International Law how far the occupying belligerent has to respect the inviolability and exterritoriality granted to such envoys by the law of the land in compliance with a demand of International Law. It may safely be maintained that he must grant them the right to leave the occupied territory. But must he likewise grant them the right to stay? Has he to respect their immunity of domicile and their other privileges in reference to their exterritoriality? Neither customary rules nor international conventions exist as regards these questions, which must, therefore, be treated as open. The only case which occurred concerning this problem is that of Mr. Washburne, ambassador of the United States in Paris during the siege of that town in 1870 by the Germans. This ambassador claimed the right of sending a messenger with despatches to London in a sealed bag through the German lines. But the Germans refused to grant that right, and did not alter their decision although the Government of the United States protested.[1]

§ 400. There is no doubt that an envoy must not

[1] See Wharton, I. § 97.

interfere with the affairs of the State to which he is accredited and a third State. If he nevertheless does interfere, he enjoys no privileges whatever against such third State. Thus, in 1734, the Marquis de Monti, the French envoy in Poland, who took an active part in the war between Poland and Russia, was made a prisoner of war by the latter and not released till 1736, although France protested.[1]

Envoy interfering with affairs of a third State.

XI

The Retinue of Diplomatic Envoys

Vattel, IV. §§ 120–124—Hall, § 51—Phillimore, II. §§ 186–193—Twiss, I. § 218—Ullmann, §§ 37, 41—Geffcken in Holtzendorff, III. pp. 660–661—Heffter, § 221—Rivier, I. pp. 458–461—Pradier-Fodéré, III. §§ 1472–1486—Fiore, II. Nos. 1164–1168—Calvo, III. §§ 1348–1350—Martens, II. § 16.

§ 401. The individuals accompanying an envoy officially, or in his private service, or as members of his family, or as couriers, compose his retinue. The members of the retinue belong, therefore, to four different classes. All those individuals who are officially attached to an envoy are members of the legation and are appointed by the home State of the envoy. To this first class belong the Councillors, Attachés, Secretaries of the Legation; the Chancellor of the Legation and his assistants; the interpreters, and the like; the chaplain, the doctor, and the legal advisers, provided that they are appointed by the home State and sent specially as members of the legation. A list of these members of legation is handed over by the envoy to the Secretary for

Different Classes of Members of Retinue.

[1] See Martens, Causes Célébres, I. p. 207.

Foreign Affairs of the receiving State and is revised from time to time. The Councillors and Secretaries of Legation are personally presented to the Secretary for Foreign Affairs, and very often also to the head of the receiving State. The second class comprises all those individuals who are in the private service of the envoy and of the members of legation, such as servants of all kinds, the private secretary of the envoy, the tutor and the governess of his children. The third class consists of the members of the family of the envoy—namely, his wife, children, and such of his other near relatives as live within his family and under his roof. And, lastly, the fourth class consists of the so-called couriers. They are the bearers of despatches sent by the envoy to his home State, who on their way back also bear despatches from the home State to the envoy. Such couriers are attached to most legations for the guarantee of the safety and secrecy of the despatches.

Privileges of Members of Legation.

§ 402. It is a generally recognised [1] rule of International Law that the members of a legation are as inviolable and exterritorial as the envoy himself. They must, therefore, be granted by the receiving State exemption from criminal and civil jurisdiction, exemption from police,[2] subpœna as witness, and taxes. They are considered, like the envoy himself, to retain their domicile within their home State. Children born to them during their stay within the receiving State are considered born on the territory of the home State. And it must be emphasised that it is

[1] Some authors, however, plead for an abrogation of this rule (See Martens, II. § 16.)

[2] A case of this kind occurred in 1904 in the United States. Mr. Gurney, Secretary of the British Legation at Washington, was fined by the police magistrate of Lee, in Massachusetts, for furiously driving a motor-car. But the judgment was afterwards annulled, and the fine imposed remitted.

not within the envoy's power to waive these privileges of the members of legation.

Privileges of Private Servants.

§ 403. It is a customary rule of International Law that the receiving State must grant to all persons in the private service of the envoy and of the members of his legation, provided such persons are not subjects of the receiving State, exemption from civil and criminal jurisdiction.[1] But the envoy can disclaim these exemptions, and these persons cannot then claim exemption from police, immunity of domicile, and exemption from taxes. Thus, for instance, if such a private servant commits a crime outside the residence of his employer, the police can arrest him; he must, however, be at once released if the envoy does not waive the exemption from criminal jurisdiction.

Privileges of Family of Envoy.

§ 404. Although the wife of the envoy, his children, and such of his near relatives as live within his family and under his roof belong to his retinue, there is a distinction to be made as regards their privileges. His wife must certainly be granted all his privileges in so far as they concern inviolability and exterritoriality. As regards, however, his children and other relatives, no general rule of International Law can safely be said to be generally recognised, but that they must be granted exemption from civil and criminal jurisdiction. But even this rule was formerly not generally recognised. Thus, when in 1653 Don Pantaleon Sà, the brother of the Portuguese ambassador in London and a member of his

[1] This rule seems to be everywhere recognised except in this country. When, in 1827, a coachman of Mr. Gallatin, the American Minister in London, committed an assault outside the embassy, he was arrested in the stable of the embassy and charged before a local magistrate, and the British Foreign Office refused to recognise the exemption of the coachman from the local jurisdiction. (See Wharton, I. § 94, and Hall, § 50.)

suite, killed an Englishman named Greenway, he was arrested, tried in England, found guilty, and executed.[1]

Privileges of Couriers of Envoy.

§ 405. To insure the safety and secrecy of the diplomatic despatches they bear, couriers must be granted exemption from civil and criminal jurisdiction and afforded special protection during the exercise of their office. It is particularly important to observe that they must have the right of innocent passage through *third* States, and that, according to general usage, those parts of their luggage which contain diplomatic despatches and are sealed with the official seal must not be opened and searched. It is usual to provide couriers with special passports for the purpose of their legitimation.

XII

Termination of Diplomatic Mission

Vattel, IV. §§ 125–126—Hall, § 98**—Phillimore, II. §§ 237–241—Taylor, §§ 320–323—Wheaton, §§ 250–251—Ullmann, § 43—Heffter, §§ 223–226—Rivier, I. § 40—Bonfils, Nos. 730–732—Pradier-Fodéré, III. §§ 1515–1535—Fiore, II. Nos. 1169–1175—Calvo, III. §§ 1363–1367—Martens, II. § 17.

Termination in contradistinction to Suspension.

§ 406. A diplomatic mission may come to an end from eleven different causes—namely, accomplishment of the object for which the mission was sent; expiration of such Letters of Credence as were given to an envoy for a specific time only; recall of the envoy by the sending State; his promotion to a higher class; the delivery of passports to him by the receiving State; request of the envoy for his passports on

[1] The case is discussed by Phillimore, II. § 169.

account of ill-treatment; war between the sending and the receiving State; constitutional changes in the headship of the sending or receiving State; revolutionary change of government of the sending or receiving State; extinction of the sending or receiving State; and, lastly, death of the envoy. These events must be treated singly on account of their peculiarities. But the termination of diplomatic missions must not be confounded with their suspension. Whereas from the foregoing eleven causes a mission comes actually to an end, and new Letters of Credence are necessary, a suspension does not put an end to the mission, but creates an interval during which the envoy, although he remains in office, cannot exercise his office. Suspension may be the result of various causes, as, for instance, a revolution within the sending or receiving State. Whatever the cause may be, an envoy enjoys all his privileges during the duration of the suspension.

Accomplishment of Object of Mission.

§ 407. A mission comes to an end through the fulfilment of its objects in all cases of missions for special purposes. Such cases may be ceremonial functions like representation at weddings, funerals, coronations; or notification of changes in the headship of a State, or representation of a State at Conferences and Congresses; and other cases. Although the mission is terminated through the accomplishment of its object, the envoys enjoy all their privileges on their way home.

Expiration of Letter of Credence.

§ 408. If a Letter of Credence for a specified time only is given to an envoy, his mission terminates with the expiration of such time. A temporary Letter of Credence may, for instance, be given to an individual for the purpose of representing a State diplomatically during the interval between the recall

of an ambassador and the appointment of his successor.

Recall.

§ 409. The mission of an envoy, be he permanently or only temporarily appointed, terminates through his recall by the sending State. If this recall is not caused by unfriendly acts of the receiving State but by other circumstances, the envoy receives a Letter of Recall from the head, or, in case he is only a Chargé d'Affaires, from the Foreign Secretary of his home State, and he hands this letter over to the head of the receiving State in a solemn audience, or to the Foreign Secretary in the case of a Chargé d'Affaires. In exchange for the Letter of Recall the envoy receives his passports and a so-called *Lettre de récréance*, a letter in which the head of the receiving State (or the Foreign Secretary) acknowledges the Letter of Recall. Although therewith his mission ends, he enjoys nevertheless all his privileges on his home journey. A recall may be caused by the resignation of the envoy, by his transference to another post, and the like. It may, secondly, be caused by the outbreak of a conflict between the sending and the receiving State which leads to a rupture of diplomatic intercourse, and under these circumstances the sending State may order his envoy to ask for his passports and depart at once without handing in a Letter of Recall. And, thirdly, a recall may result from a request of the receiving State by reason of real or alleged misconduct of the envoy. Such request of recall may lead to a rupture of diplomatic intercourse, if the receiving State insists upon the recall, although the sending State does not recognise the act of his envoy as misconduct.[1]

[1] Notable cases of recall of envoys are reported by Taylor, § 322, and Hall, § 98***.

Promotion to a higher Class.

§ 410. When an envoy remains at his post, but is promoted to a higher class—for instance, when a Chargé d'Affaires is created a Minister Resident or a Minister Plenipotentiary is created an Ambassador—his original mission technically ends, and he receives therefore a new Letter of Credence.

Delivery of Passports.

§ 411. A mission may terminate, further, through the delivery of his passports to an envoy by the receiving State. The reason for such dismissal of an envoy may either be gross misconduct on his part or a quarrel between the sending and the receiving State which leads to a rupture of diplomatic intercourse.

Request for Passports.

§ 412. Without being recalled, an envoy may on his own account ask for his passports and depart in consequence of ill-treatment by the receiving State. This may or may not lead to a rupture of diplomatic intercourse.

Outbreak of War.

§ 413. When war breaks out between the sending and the receiving State before their envoys accredited to each other are recalled, their mission comes nevertheless to an end. They receive their passports, but they must be granted nevertheless their privileges on their way home.[1]

Constitutional Changes.

§ 414. If the head of the sending or receiving State is a Sovereign, his death or abdication terminates the missions sent and received by him, and all envoys remaining at their posts must receive new Letters of Credence. But if they receive new Letters of Credence, no change in seniority is considered to have taken place from the order before the change. And during the time between the termination of the missions and the arrival of new Letters of Credence

[1] See below, vol. II. § 98.

they enjoy nevertheless all the privileges of diplomatic envoys.

As regards the influence of constitutional changes in the headship of republics on the missions sent or received, no certain rule exists.[1] Everything depends, therefore, upon the merits of the special case.

Revolutionary Changes of Government.

§ 415. A revolutionary movement in the sending or receiving State which creates a new government, changing, for example, a republic into a monarchy or a monarchy into a republic, or deposing a Sovereign and enthroning another, terminates the missions. All envoys remaining at their posts must receive new Letters of Credence, but no change in seniority takes place if they receive them. It happens that in cases of revolutionary changes of government foreign States for some time neither send new Letters of Credence to their envoys nor recall them, watching the course of events in the meantime and waiting for more proof of a real settlement. In such cases the envoys are, according to an international usage, granted all the privileges of diplomatic envoys, although in strict law they have ceased to be this. In cases of recall subsequent to revolutionary changes, the protection of subjects of the recalling States remains in the hands of their consuls, since the consular office[2] does not come to an end through constitutional or revolutionary changes in the headship of a State.

Extinction of sending or receiving State.

§ 416. If the sending or receiving State of a mission is extinguished by voluntary merger into another State or through annexation in consequence

[1] Writers on International Law differ concerning this point. See, for instance, Ullmann, § 43, in contradistinction to Rivier, I. p. 517.

[2] See below, § 438.

of conquest, the mission terminates *ipso facto*. In case of annexation of the receiving State, there can be no doubt that, although the annexing State will not consider the envoys received by the annexed State as accredited to itself, it must grant those envoys the right to leave the territory of the annexed State unmolested and to take their archives away with them. In case of annexation of the sending State, the question arises what becomes of the archives and legational property of the missions of the annexed State accredited to foreign States. This question is one on the so-called succession[1] of States. The annexing State acquires, *ipso facto*, by the annexation the property in those archives and other legational goods, such as the hotels, furniture, and the like. But as long as the annexation is not notified and recognised, the receiving States have no duty to interfere.

Death of Envoy.

§ 417. A mission ends, lastly, by the death of the envoy. As soon as an envoy is dead, his effects, and especially his papers, must be sealed. This is done by a member of the dead envoy's legation, or, if there be no such members, by a member of another legation accredited to the same State. The local Government must not interfere, unless at the special request by the home State of the deceased envoy.

Although the mission and therefore the privileges of the envoy come to an end by his death, the members of his family who resided under his roof and the members of his suite enjoy their privileges until they leave the country. But a certain time may be fixed for them to depart, and on its expira-

[1] See above, § 82.

tion they lose their privilege of exterritoriality. It must be specially mentioned that the Courts of the receiving State have no jurisdiction whatever over the goods and effects of the deceased envoy, and that no death duties can be demanded.

CHAPTER III

CONSULS

I

The Institution of Consuls

Hall, § 105—Phillimore, II. §§ 243-246—Halleck, I. p. 369—Taylor, §§ 325-326—Twiss, I. § 223—Ullmann, §§ 44-45—Bulmerincq in Holtzendorff, II. pp. 687-695—Heffter, §§ 241-242—Rivier, I. § 41—Calvo, III. §§ 1368-1372—Bonfils, Nos. 731-743—Pradier-Fodéré, IV. §§ 2034-2043—Martens, II. §§ 18-19—Fiore, II. Nos. 1176-1178—Warden, "A Treatise on the Origin, Nature, etc., of the Consular Establishment" (1814)—Cussy, "Règlements consulaires des principaux États maritimes" (1851)—H. B. Oppenheim, "Handbuch der Consulate aller Länder" (1854)—Clercq et Vallat, "Guide pratique des consulats" (5th ed. 1898)—Salles, "L'institution des consulats, son origine, etc." (1898).

Development of the Institution of Consuls.

§ 418. The roots of the consular institution go back to the second half of the Middle Ages. In the commercial towns of Italy, Spain, and France the merchants used to appoint by election one or more of their fellow-merchants as arbitrators in commercial disputes, who were called *Juges Consuls* or *Consuls Marchands.* When, between and after the Crusades, Italian, Spanish, and French merchants settled down in the Eastern countries, founding factories, they brought the institution of consuls with them, the merchants belonging to the same nation electing their own consul. The competence of these consuls became, however, more and more enlarged through treaties, so-called "Capitulations," between

the home States of the merchants and the Mohammedan monarchs on whose territories these merchants had settled down.[1] The competence of the consuls comprised at last the whole civil and criminal jurisdiction over, and protection of, the privileges, the life, and the property of their countrymen. From the East the institution of consuls was transferred to the West. Thus, in the fifteenth century Italian consuls existed in the Netherlands and in London, English consuls in the Netherlands, Sweden, Norway, Denmark, Italy (Pisa). These consuls in the West exercised, just as those in the East, exclusive civil and criminal jurisdiction over the merchants of their nationality. But the position of the consuls in the West decayed in the beginning of the seventeenth century through the influence of the rising permanent legations on the one hand, and, on the other, from the fact that everywhere foreign merchants were brought under the civil and criminal jurisdiction of the State in which they resided. This change in their competence altered the position of consuls in the Christian States of the West altogether. Their functions now shrank into a general supervision of the commerce and navigation of their home States, and into a kind of protection of the commercial interests of their countrymen. Consequently, they did not receive much notice in the seventeenth and eighteenth centuries, and it was not until the nineteenth century that the general development of international commerce, navigation, and shipping drew the attention of the Governments again to the value and importance of the institution of consuls. The institution was now systematically developed. The positions of the consuls, their

[1] See Twiss, I. §§ 253-263.

functions, and their privileges, were the subjects of stipulations either in commercial treaties or in special consular treaties,[1] and the single States enacted statutes regarding the duties of their consuls abroad, such as the Consular Act passed by England in 1826.[2]

General Character of Consuls.

§ 419. Nowadays consuls are agents of States residing abroad for purposes of various kinds, but mainly in the interests of the commerce and navigation of the appointing State. As they are not diplomatic representatives, they do not enjoy the privileges of diplomatists. Nor have they, ordinarily, anything to do with intercourse between their home State and the State they reside in. But these rules have exceptions. Consuls of Christian Powers in non-Christian States, Japan now excepted, have retained their former competence and exercise full civil and criminal jurisdiction over their countrymen. And sometimes consuls are charged with the tasks which are regularly fulfilled by diplomatic representatives. Thus, in States under suzerainty the Powers are frequently represented by consuls, who transact all the business otherwise transacted by diplomatic representatives, and who have, therefore, often the title of "Diplomatic Agents." Thus, too, on occasions small States, instead of accrediting diplomatic envoys to another State, send only a consul thither, who combines the consular functions with those of a diplomatic envoy. It must, however, be emphasised that consuls thereby neither become diplomatic envoys, although they may have the title of "Diplomatic Agents," nor enjoy the diplomatic envoys' privileges, if such privileges are not specially

[1] Phillimore, II. § 255, gives a list of such treaties.
[2] 6 Geo. IV. c. 87.

provided for by treaties between the home State and the State they reside in. Different, however, is the case in which a consul is at the same time accredited as Chargé d'Affaires, and in which, therefore, he combines two different offices; for as Chargé d'Affaires he is a diplomatic envoy and enjoys all the privileges of such an envoy, provided he has received a Letter of Credence.

II

Consular Organisation

Hall, "Foreign Powers and Jurisdiction," § 13—Phillimore, II. §§ 253–254—Halleck, I. p. 371—Taylor, § 528—Ullmann, § 47—Bulmerincq, in Holtzendorff, III. pp. 695–701—Rivier, I. § 41—Calvo, III. §§ 1373–1376—Bonfils, Nos. 743–748—Pradier-Fodéré, IV. §§ 2050–2055—Martens, II. § 20—"General Instructions for His Majesty's Consular Officers" (1893).

Different kinds of Consuls.

§ 420. Consuls are of two kinds. They are either specially sent and paid for the administration of their consular office (*Consules missi*), or they are appointed from individuals, in most cases merchants, residing in the district for which they are to administer the consular office (*Consules electi*).[1] Consuls of the first kind, who are so-called professional consuls and are always subjects of the sending State, have to devote their whole time to the consular office. Consuls of the second kind, who may or may not be subjects of the sending State, administer the consular office besides following their ordinary callings. Some States, such as France, appoint professional consuls only; most States, however, appoint Consuls of both kinds according to the importance of the

[1] To this distinction corresponds in the British Consular Service the distinction between "Consular Officers" and "Trading Consular Officers."

consular districts. But there is a general tendency with most States to appoint professional consuls for important districts.

No difference exists between the two kinds of consuls as to their general position according to International Law. But, naturally, a professional consul enjoys actually a greater authority and a more important social position, and consular treaties often stipulate special privileges for professional consuls.

Consular Districts.

§ 421. As the functions of consuls have a more or less local character, most States appoint several consuls on the territory of the other larger States, limiting the duties of the different consuls within certain districts of such territories or even within a certain town or port only. Such consular districts as a rule concide with provinces of the State in which the consuls administer their offices. The different consuls appointed by a State for different districts of the same State are independent of each other and conduct their correspondence directly with the Foreign Office of their home State, the agents-consular excepted, who correspond with their nominators only. The extent of the districts is agreed upon between the home State of the consul and the admitting State. Only the consul appointed for a particular district is entitled to exercise consular functions within its boundaries, and to him only the local authorities have to grant the consular privileges, if any.

Different Classes of Consuls

§ 422. Four classes of consuls are generally distinguished according to rank: consuls-general, consuls, vice-consuls, and agents-consular. Consuls-general are appointed either as the head of several consular districts, and have then several consuls subordinate

to themselves, or as the head of one very large consular district. Consuls are usually appointed for smaller districts, and for towns or even ports only. Vice-consuls are such assistants of consuls-general and consuls as themselves possess the consular character and take, therefore, the consul's place in regard to the whole consular business; they are, according to the Municipal Law of some States, appointed by the consul, subject to the approbation of his home State. Agents-consular are agents with consular character appointed, subject to the approbation of the home Government, by a consul-general or consul for the exercise of certain parts of the consular functions in certain towns or other places of the consular district. Agents-consular are not independent of the appointing consul, and do not correspond directly with the home State, as the appointing consul is responsible for the agents-consular to his Government. The so-called Proconsul is not a consul, but a *locum tenens* of a consul only during the latter's temporary absence or illness; he possesses, therefore, consular character for such time only as he actually is the *locum tenens*.

The British Consular Service consists of the following six ranks: (1) Agents and consuls-general, commissioners and consuls-general; (2) consuls-general; (3) consuls; (4) vice-consuls; (5) consular agents; (6) proconsuls. In the British Consular Service proconsuls only exercise, as a rule, the notarial functions of a consular officer.

Consuls subordinate to Diplomatic Envoys.

§ 423. Although consuls conduct their correspondence directly with their home Government, they are nevertheless, according to the Municipal Law of their home State and according to International Law, subordinate to the diplomatic envoy of their home

Government accredited to the State in which they administer the consular offices. The diplomatic envoy has full authority and control over the consuls. He can give instructions and orders, which they have to execute. In doubtful cases they have to ask his advice and instructions. On the other hand, the diplomatic envoy has to protect the consuls in case they are injured by the local Government.

III

Appointment of Consuls

Hall, § 105—Phillimore, II. § 250—Halleck, I. p. 371—Ullmann, § 48—Bulmerincq in Holtzendorff, III. pp. 702-706—Rivier, I. § 41—Calvo, III. §§ 1378-1384—Bonfils, Nos. 749-752—Pradier-Fodéré, IV. §§ 2056-2067—Fiore, II. Nos. 1181-1182—Martens, II. § 21.

Qualification of Candidates.

§ 424. International Law has no rules in regard to the qualifications of an individual whom a State can appoint consul. Many States, however, possess such rules in their Municipal Law as far as professional consuls are concerned. The question, whether female consuls could be appointed, cannot be answered in the negative, but, on the other hand, no State is obliged to grant female consuls the *exequatur*, and many States would at present certainly refuse it.

No State obliged to admit Consuls.

§ 425. According to International Law a State is not at all obliged to admit consuls. But the commercial interests of all the States are so powerful that practically every State must admit consuls of foreign Powers, as a State which refused such admittance would in its turn not be allowed to have its own consuls abroad. The commercial and consular treaties between two States stipulate as a rule that the contracting States shall have the right to appoint consuls in

all those parts of each other's country in which consuls of third States are already or shall in future be admitted. Consequently, a State cannot refuse admittance to a consul of one State for a certain district if it admits a consul of another State. But as long as a State has not admitted any other State's consul for a district, it can refuse admittance to a consul of the State anxious to organise consular service in that district. Thus, for instance, Russia refused for a long time for political reasons to admit consuls in Warsaw.

What kind of States can appoint Consuls.

§ 426. There is no doubt that it is within the faculty of every full-Sovereign State to appoint consuls. As regards not full-Sovereign States, everything depends upon the special case. As foreign States can appoint consuls in States under suzerainty, it cannot be doubted that, provided the contrary is not specially stipulated between the vassal and the suzerain State, and provided the vassal State is not one which has no position within the Family of Nations,[1] a vassal State is in its turn competent to appoint consuls in foreign States. In regard to member-States of a Federal State it is the Constitution of the Federal State which settles the question. Thus, according to the Constitution of Germany, the Federal State is exclusively competent to appoint consuls, in contradistinction to diplomatic envoys who may be sent and received by every member-State of the German Empire.

Mode of Appointment and of Admittance.

§ 427. Consuls are appointed through a patent or commission, the so-called *Lettre de provision*, of the State whose consular office they are intended to administer. Vice-consuls are sometimes, and agents-consular are always, appointed by the consul, subject

[1] See above, § 91.

to the approval of the home State. Admittance of consuls takes place through the so-called *exequatur*, granted by the head of the admitting State. The diplomatic envoy of the appointing State hands the patent of the appointed consul on to the Secretary for Foreign Affairs for communication to the head of the State, and the *exequatur* is given either in a special document or by means of the word *exequatur* written across the patent. But the *exequatur* can be refused for personal reasons. Thus, in 1869 England refused the *exequatur* to an Irishman named Haggerty, who was naturalised in the United States and appointed American consul for Glasgow. And the *exequatur* can be withdrawn for personal reasons at any moment. Thus, in 1834 France withdrew it from the Prussian consul at Bayonne for having helped in getting into Spain supplies of arms for the Carlists.

Appointment of Consuls includes Recognition.

§ 428. As the appointment of consuls takes place in the main for commercial purposes only, and has merely local importance without any political consequences, it is maintained[1] that a State does not indirectly recognise a newly created State *ipso facto* by appointing a consul to a district in such State. This opinion, however, does not agree with the facts of international life. Since no consul can exercise his functions before he has handed over his patent to the local State and received the latter's *exequatur*, it is evident that thereby the appointing State enters into such formal intercourse with the admitting State as indirectly[2] involves recognition.

[1] Hall, §§ 26* and 105.

[2] See above, § 72.

IV

Functions of Consuls

Hall, § 105—Phillimore, II. §§ 257-260—Taylor, § 327—Halleck, I. pp. 380-385—Ullmann, § 51—Bulmerincq in Holtzendorff, III. pp. 738-749—Rivier, I. § 42—Calvo, III. §§ 1421-1429—Bonfils, Nos. 762-771—Pradier-Fodéré, IV. §§ 2069-2113—Fiore, II. Nos. 1184-1185—Martens, II. § 23.

On Consular Functions in general.

§ 429. Although consuls are appointed chiefly in the interest of commerce, industry, and navigation, they are nevertheless charged with various functions for other purposes. Custom, commercial and consular treaties, Municipal Laws, and Municipal Consular Instructions contain detailed rules in regard to these functions. They may be grouped under the heads of fosterage of commerce and industry, supervision of navigation, protection, notarial functions.

Fosterage of Commerce and Industry.

§ 430. As consuls are appointed in the interest of commerce and industry, they must be allowed by the receiving State to watch over the execution of the commercial treaties of their home State, to send reports to the latter in regard to everything which can influence the development of its commerce and industry, and to give such information to the merchants and manufacturers of the appointing State as is necessary for the protection of their interests. The Municipal Laws of the different States and their Consular Instructions comprise detailed rules on these consular functions which are of the greatest importance. Consular reports, on the one hand, and consular information to members of the commercial world, on the other, have in the past and the present rendered valuable assistance to the development of the commerce and industry of their home States.

§ 431. Another task of consuls consists in supervision of the navigation of the appointing State. A consul at a port must be allowed to keep his eye on all merchantmen sailing under the flag of his home State which enter the port, to control and legalise their ship papers, to exercise the power of inspecting them on their arrival and departure, to settle disputes between the master and the crew or the passengers. He assists sailors in distress, undertakes the sending home of shipwrecked crews and passengers, attests averages. It is neither necessary nor possible to enumerate all the duties and powers of consuls in regard to supervision of navigation. Consular and commercial treaties, on the one hand, and, on the other, Municipal Laws and Consular Instructions, comprise detailed rules regarding these consular functions. It should, however, be added that consuls must assist in every possible way any public vessel of their home State which enters their port, if the commander so requests. But consuls have no power of supervision over such public vessels. Supervision of Navigation.

§ 432. The protection which consuls must by the receiving State be allowed to provide for the subjects of the appointing State is a very important task. For that purpose consuls keep a register, in which these subjects can have their names and addresses recorded. They make out passports, they have to render a certain assistance and help to paupers and the sick, to litigants before the Courts. If a foreign subject is wronged by the local authorities, his consul has to give him advice and help, and has eventually to interfere on his behalf. If a foreigner dies, his consul may be approached for securing the property and for rendering all kind of assistance and help to Protection.

the family of the deceased. As a rule, a consul exercises protective functions over subjects of the appointing State only ; but the latter may charge him with the protection of subjects of other States which have not nominated a consul for his district.

Notarial Functions.

§ 433. Very important, too, are the notarial and the like functions with which consuls are charged. They attest and legalise signatures, examine witnesses and administer oaths for the purpose of procuring evidence for the Courts and other authorities of the appointing State. They conclude marriages of the latter's subjects, take charge of their wills, legalise their adoptions, register their births and deaths. They provide authorised translations for the local as well as for the home authorities, and furnish attestations of many kinds. All consular functions of this kind, too, are specialised by Municipal Laws and Consular Instructions. But it should be emphasised that whereas fosterage of commerce, supervision of navigation, and protection are functions the exercise of which must, according to a customary rule of International Law, be granted to consuls by the receiving States, their notarial functions need not be permitted by the admitting State in the absence of treaty stipulations.

V

Position and Privileges of Consuls

Hall, § 105—Phillimore, II. §§ 261–271—Halleck, I. pp. 371–379—Taylor, §§ 326, 332–333—Ullmann, §§ 50, 52—Bulmerincq in Holtzendorff, III. pp. 710–720—Rivier, I. § 42—Calvo, III. §§ 1385–1420—Bonfils, Nos. 753–761—Pradier-Fodéré, IV. §§ 2114–2121—Fiore, II. No. 1183—Martens, II. § 22—Bodin, "Les immunités consulaires" (1899).

Position.

§ 434. Like diplomatic envoys, consuls are simply objects of International Law. Such rights as they have are granted to them by Municipal Laws in compliance with the rights of the appointing States according to International Law.[1] As regards their position, it should nowadays be an established and uncontested fact that consuls do not enjoy the position of diplomatic envoys, since no Christian State actually grants to foreign consuls the privileges of diplomatic envoys. On the other hand, it would be incorrect to maintain that their position is in no way different from that of any other individual living within the consular district. Since they are appointed by foreign States and have received the *exequatur*, they are publicly recognised by the admitting State as agents of the appointing State. Of course, consuls are not diplomatic representatives, for they do not represent the appointing States in the totality of their international relations, but for a limited number of tasks and for local purposes only. Yet they bear a recognised public character, in contradistinction to mere private individuals, and, consequently, their position is different from that of

[1] See above, § 384.

mere private individuals. This is certainly the case with regard to professional consuls, who are officials of their home State and are specially sent to the foreign State for the purpose of administering the consular office. But in regard to non-professional consuls it must likewise be maintained that the admitting State by granting the *exequatur* recognises their official position towards itself, which demands at least a special protection of their persons and residences. The official position of consuls, however, does not involve direct intercourse with the Government of the admitting State. Consuls are appointed for *local* purposes only, and they have, therefore, direct intercourse with the *local authorities* only. If they want to approach the Government itself, they can do so only through the diplomatic envoy, to whom they are subordinate.

Consular Privileges.

§ 435. From the undoubted official position of consuls no universally recognised privileges of importance emanate as yet. Apart from the special protection due to consuls according to International Law, there is neither a custom nor a universal agreement between the Powers to grant them important privileges. Such privileges as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations of a Commercial or Consular Treaty between the sending and the admitting State. I doubt not that in time the Powers will agree upon a universal treaty in regard to the position and privileges of consuls.[1] Meanwhile, it is of interest to take notice of some of the more important stipulations which are to be found in the innumerable treaties

[1] The Institute of International Law at its meeting at Venice in 1896 adopted a *Règlement sur les immunités consulaires* comprising twenty-one articles. See Annuaire, XV. p. 304.

between the different States in regard to consular privileges :

(1) A distinction is very often made between professional and non-professional consuls in so far as the former is accorded more privileges than the latter.

(2) Although consuls are not exempt from the local civil and criminal jurisdiction, the latter is in regard to professional consuls often limited to crimes of a more serious character.

(3) In many treaties it is stipulated that consular archives shall be inviolable from search or seizure. Consuls are therefore obliged to keep their official documents and correspondence separate from their private papers.

(4) Inviolability of the consular buildings is also sometimes stipulated, so that no officer of the local police, Courts, and so on, can enter these buildings without special permission of the consul. But it is then the duty of consuls to surrender criminals who have taken refuge in these buildings.

(5) Professional consuls are often exempt from all kinds of rates and taxes, from the liability to have soldiers quartered in their houses, from the duty to appear in person as witnesses before the Courts. In the latter case either consuls have to send in their evidence in writing, or their evidence may be taken by a commission on the premises of the consulate.

(6) Consuls of all kinds have the right to put up the arms of the appointing State over the door of the consular building and to hoist the national flag.

VI

Termination of Consular Office

Hall, § 105—Ullmann, § 49—Bulmerincq in Holtzendorff, III. 708—Rivier, I. § 41—Calvo, III. §§ 1382, 1383, 1450—Bonfils, No. 775—Fiore, II. No. 1187—Martens, II. § 21.

Undoubted Causes of Termination.

§ 436. Death of the consul, withdrawal of the *exequatur*, recall or dismissal, and, lastly, war between the appointing and the admitting State, are universally recognised causes of termination of the consular office. When a consul dies or war breaks out, the consular archives must not be touched by the local authorities. They remain either under the care of an *employé* of the consulate, or a consul of another State takes charge of them until the successor of the deceased arrives or peace is concluded.

Doubtful causes of Termination.

§ 437. It is not certain in practice whether the office of a consul terminates when his district, through cession, conquest followed by annexation, or revolt, becomes the property of another State. The question ought to be answered in the affirmative, because the *exequatur* given to such consul originates from a Government which now no longer possesses the territory. A practical instance of this question occurred in 1836, when Belgium, which was then not yet recognised by Russia, declared that she would henceforth no longer treat the Russian consul Aegi at Antwerp as consul, because he was appointed before the revolt and had his *exequatur* granted by the Government of the Netherlands. Although Belgium gave way in the end to the urgent remonstrances of Russia, her original attitude was legally correct.

Change in the Headship of

§ 438. It is universally recognised that, in contradistinction to a diplomatic mission, the consular

office does not come to an end through a change in the headship of the appointing or the admitting State. Neither a new patent nor a new *exequatur* is therefore necessary whether another king comes to the throne or a monarchy turns into a republic, and the like.

States no Cause of Termination.

VII

Consuls in Non-Christian States

Tarring, "British Consular Jurisdiction in the East" (1887)—Hall, "Foreign Powers and Jurisdiction," §§ 64–85—Halleck, I. pp. 385–398—Phillimore, II. §§ 272–277—Taylor, §§ 331–333—Twiss, I. § 136—Wheaton, § 110—Ullmann, §§ 54–55—Bulmerincq in Holtzendorff, III. pp. 720–738—Rivier, I. § 43—Calvo, III. §§ 1431–1449—Bonfils, Nos. 776–791—Pradier-Fodéré, IV. 2122–2138—Martens, II. §§ 24–26—Martens, "Konsularwesen und Konsularjurisdiction im Orient" (German translation from the Russian original by Skerst, 1874)—Bruillat, "Etude historique et critique sur les juridictions consulaires" (1898)—Lippmann, "Die Konsularjurisdiction im Orient" (1898)—Vergé, "Des consuls dans les pays d'occident" (1903).

Position of Consuls in non-Christian States.

§ 439. Fundamentally different from their regular position is that of consuls in non-Christian States, with the single exception of Japan. In the Christian countries of the West alone consuls have, as has been stated before (§ 418), lost jurisdiction over the subjects of the appointing States. In the Mohammedan States consuls not only retained their original jurisdiction, but the latter became by-and-by so extended through the so-called Capitulations that the competence of consuls comprised soon the whole civil and criminal jurisdiction, the power of protection of the privileges, the life, and property of their countrymen, and even the power to expel one of their countrymen for bad conduct. And custom

and treaties secured to consuls inviolability, exterritoriality, ceremonial honours, and miscellaneous other rights, so that there is no doubt that their position is materially the same as that of diplomatic envoys. From the Mohammedan countries this position of consuls has been extended and transferred to China, Japan, Korea, Persia, and other non-Christian countries, but in Japan the position of consuls shrank in 1899 into that of consuls in Christian States.

Consular Jurisdiction in non-Christian States.

§ 440. International custom and treaties lay down the rule only that all the subjects of Christian States residing in non-Christian States shall remain under the jurisdiction of the home State as exercised by their consuls.[1] It is a matter for the Municipal Laws of the different Christian States to organise this consular jurisdiction. All States have therefore enacted statutes dealing with this matter. As regards Great Britain, several Orders in Council and the Foreign Jurisdiction Act (53 & 54 Vict., c. 37) of 1890 are now the legal basis of the consular jurisdiction. The working of this consular jurisdiction is, however, not satisfactory in regard to the so-called mixed cases. As the national consul has exclusive jurisdiction over the subjects of his home State, he exercises this jurisdiction also in cases in which the plaintiff is a native or a subject of another Christian State, and which are therefore called mixed cases.

International Courts in Egypt.

§ 441. To overcome in some points the disadvantages of the consular jurisdiction, an interesting experiment is being made in Egypt. On the initiative of the Khedive, most of the Powers in 1875 agreed upon an organisation of International Courts in Egypt for mixed cases.[2] These Courts began

[1] See above, § 318.

[2] See Holland, The European Concert in the Eastern Question, pp. 101–102.

their functions in 1876. They are in the main competent for mixed civil cases, mixed criminal cases of importance remaining under the jurisdiction of the national consuls. There are three International Courts of first instance—namely, at Alexandria, Cairo, and Ismailia (formerly at Zagazig), and one International Court of Appeal at Alexandria. The tribunals of first instance are each composed of three natives and four foreigners, the Court of Appeal is composed of four natives and seven foreigners.

Exceptional Character of Consuls in non-Christian States.

§ 442. There is no doubt that the present position of consuls in non-Christian States is in every point an exceptional one, which does not agree with the principles of International Law otherwise universally recognised. But the position is and must remain a necessity as long as the civilisation of non-Christian States has not developed their ideas of justice in accordance with the Christian ideas, so as to preserve the life, property, and honour of foreigners before native Courts. Japan is an example of the readiness of the Powers to consent to the withdrawal of consular jurisdiction in non-Christian States as soon as they have reached a certain level of civilisation.

CHAPTER IV

MISCELLANEOUS AGENCIES

I

Armed Forces on Foreign Territory

Hall, §§ 54, 56, 102—Halleck, I. pp. 477–479—Phillimore, I. § 341—Taylor, § 131—Twiss, I. § 165—Wheaton, § 99—Westlake, I. p. 255—Stoerk in Holtzendorff, II. pp. 664–666—Rivier, I. pp. 333–335—Calvo, III. § 1560—Fiore, I. Nos. 528–529.

Armed Forces State Organs.

§ 443. Armed forces are organs of the State which maintains them, because such forces are created for the purpose of maintaining the independence, authority, and safety of the State. And in this respect it matters not whether armed forces are at home or abroad, for they are organs of their home State even when on foreign territory, provided only they are there in the service of their State and not for their own purposes. For if a body of armed soldiers enters foreign territory without orders from or otherwise in the service of its State, but on its own account, be it for pleasure or for the purpose of committing acts of violence, it is no longer an organ of its State.

Occasions for Armed Forces abroad.

§ 444. Besides war, there are several occasions for armed forces to be on foreign territory in the service of their home State. Thus, a State may have a right to keep troops in a foreign fortress or to send troops through foreign territory. Thus, further, a State which has been victorious in war with another may,

after the conclusion of peace, occupy a part of the territory of its former opponent as a guarantee for the execution of the Treaty of Peace. After the Franco-German war, for example, the Germans in 1871 occupied a part of the territory of France until the final instalments of the indemnity for the war costs of five milliards of francs were paid. It may also be a case of necessity for the armed forces of a State to enter foreign territory and commit acts of violence there, such as the British did in the case of the "Caroline."[1]

Position of Armed Forces abroad

§ 445. Whenever armed forces are on foreign territory in the service of their home State, they are considered exterritorial and remain, therefore, under the jurisdiction of the latter. A crime committed by a member of the force on foreign territory cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of its home State.[2] This is, however, valid only in case the crime is committed either within the place where the force is stationed, or anywhere else where the criminal was on duty. If, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the latter, not on duty but for recreation and pleasure, and then and there commit a crime, the local authorities are competent to punish them.

Case of McLeod.

§ 446. An excellent example of the position of armed forces abroad is furnished by the case of McLeod,[3] which occurred in 1841. Alexander

[1] See above, § 133, and below, § 446.

[2] This is nowadays the opinion of the vast majority of writers on International Law. There are, however, still a few dissenting authorities, such as Bar (Lehrbuch des internationalen Privat- und Strafrecht (1892), p. 351), and Rivier (I. p. 333.)

[3] See Wharton, I. § 21.

McLeod, who was a member of the British force sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the "Caroline," a boat equipped for crossing into Canadian territory and taking help to the Canadian insurgents, came in 1841 on business to the State of New York, and was arrested and indicted for the killing of one Amos Durfee, a citizen of the United States, on occasion of the capture of the "Caroline." The English Ambassador at Washington demanded the release of McLeod, on the ground that he was at the time of the alleged crime a member of a British armed force sent into the territory of the United States by the Canadian Government acting in a case of necessity. McLeod was not released, but had to take his trial; he was, however, acquitted. It is of importance to quote a passage in the reply of Mr. Webster, the Secretary of Foreign Affairs of the United States, to a note of the British Ambassador concerning this affair. The passage runs thus:—"The Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not . . . to be holden personally responsible in the ordinary tribunals for their participation in it."

II

Men-of-war in Foreign Waters

Hall, §§ 54–55—Halleck, I. pp. 215–230—Lawrence, §§ 128–129—Phillimore, II. §§ 344–350—Westlake, pp. 256–259—Taylor, § 261—Twiss, I. § 165—Wheaton, § 100—Bluntschli, § 321—Stoerk in Holtzendorff, II. pp. 434 and 446—Perels, §§ 11, 14, 15—Heilborn, System, pp. 248–279—Rivier, I. pp. 333–335—Bonfils, Nos. 614–623—Calvo, III. §§ 1550–1559—Fiore, I. Nos. 547–550—Testa, p. 86.

Men-of-war State Organs.

§ 447. Men-of-war are State organs just as armed forces are, a man-of-war being in fact a part of the armed forces of a State. And respecting their character as State organs, it matters nought whether men-of-war are at home or in foreign territorial waters or on the High Seas. But it must be emphasised that men-of-war are State organs only as long as they are manned and under the command of a responsible officer, and, further, as long as they are in the service of a State. A shipwrecked man-of-war abandoned by her crew is no longer a State organ, nor does a man-of-war in revolt against her State and sailing for her own purposes retain her character as an organ of a State. On the other hand, public vessels in the service of the police and the Custom House of a State; further, private vessels chartered by a State for the transport of troops and war materials; and, lastly, vessels carrying a head of a State and his suite exclusively, are also considered State organs, and are, consequently, in every point treated as though they were men-of-war.

Proof of Character as Men-of war.

§ 448. The character of a man-of-war or of any other vessel treated as a man-of-war is, in the first instance, proved by her outward appearance, such vessels flying the war flag and the pennant of their States. If, nevertheless, the character of the vessel

seems doubtful, her commission, duly signed by the authorities of the State which she appears to represent, supplies a complete proof of her character as a man-of-war. And it is by no means necessary to prove that the vessel is really the property of the State, the commission being sufficient evidence of her character. Vessels chartered by a State for the transport of troops or for the purpose of carrying its head are indeed not the property of such State, although they bear, by virtue of their commission, the same character as men-of-war.[1]

Occasions for Men-of-war abroad.

§ 449. Whereas armed forces in time of peace have no occasion to be abroad, cases of a special right from a convention and cases of necessity excepted, men-of-war of all maritime States possessing a navy are constantly crossing the High Seas in all parts of the world for all kinds of purposes. Occasions for men-of-war to sail through foreign territorial waters and to enter foreign ports necessarily arise therefrom. And a special convention between the flag-State and the riparian State is not necessary to enable a man-of-war to enter and sail through foreign territorial waters and to enter a foreign port. All territorial waters and ports of the civilised States are, as a rule, quite as much open to men-of-war as to merchantmen of all nations, provided they are not excluded by special international stipulations or special Municipal Laws of the riparian States. On the other hand, it must be emphasised that, provided special international stipulations or special treaties between the flag-State and the riparian State do not prescribe the contrary in regard to one port or another and in regard to certain territorial waters,

[1] Privateers used to enjoy the same character and exemptions as men-of-war.

a State is in strict law always competent to exclude men-of-war from all or certain of its ports, and from those territorial waters which do not serve as highways for international traffic.[1] And a State is, further, always competent to impose what conditions it thinks necessary upon men-of-war which it allows to enter its ports, provided these conditions do not deny to men-of-war their universally recognised privileges.

Position of Men-of-war in foreign waters.

§ 450. The position of men-of-war in foreign waters is characterised by the fact that they are called "floating" portions of the flag-State. For at the present time a customary rule of International Law is universally recognised that the owner State of the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag-State.[2] Consequently, a man-of-war, with all persons and goods on board, remains under the jurisdiction of her flag-State even during her stay in foreign waters. No official of the riparian State is allowed to board the vessel without special permission of the commander. Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the

[1] The matter is controversial. See above, § 188, and Westlake, I. p. 192, in contradistinction to Hall, § 42.

[2] This rule became universally recognised during the nineteenth century only. On the change of doctrines formerly held in this country and the United States of America, see Hall, § 54, and Lawrence, § 128. English and American Courts recognise now the exterritoriality of foreign public vessels. Thus, in the case of the "Exchange" (7 Cranch, 116), the Supreme Court of the United States recognised the fact that the latter had no jurisdiction over this French man-of-war. In the case of the "Constitution," an American man-of-war, the High Court of Admiralty in 1879 held that foreign public ships cannot be sued in English Courts for salvage (L.R., 4 P.D. 39). And in the case of the "Parlement Belge" (L.R., 5 P.D. 197) the Court of Appeal, affirmed by the House of Lords, in 1878 held that foreign public vessels cannot be sued in English Courts for damages for collision.

commander and the other home authorities. Individuals who are subjects of the riparian State and are only temporarily on board may, although they need not, be taken to the home country of the vessel, to be there punished if they commit a crime on board. Even individuals who do not belong to the crew, and who after having committed a crime on the territory of the riparian State have taken refuge on board, cannot be forcibly taken out of the vessel; if the commander refuses their surrender, it can be obtained only by means of diplomacy from the home State.

On the other hand, men-of-war cannot do what they like in foreign waters. They are expected voluntarily to comply with the laws of the riparian States with regard to order in the ports, the places for casting anchor, sanitation and quarantine, customs, and the like. A man-of-war which refuses to do so can be expelled, and, if on such or other occasions she commits acts of violence against the officials of the riparian State or against other vessels, steps may be taken against her to prevent further acts of violence. But it must be emphasised that even by committing acts of violence a man-of-war does not fall under the jurisdiction of the riparian State. Only such measures are allowed against her as are necessary to prevent her from further acts of violence.

Position of Crew when on Land abroad.

§ 451. Of some importance is the controversial question respecting the position of the commander and the crew of a man-of-war in foreign ports when they are on land. The majority of publicists distinguish[1] between a stay on land in the service of the

[1] There are, however, several writers on International Law who do not make this distinction, and who maintain that commanders or members of the crew whilst ashore are in every case under the local jurisdiction. See, for instance, Hall, § 55; Phillimore, II. § 346; Testa, p. 109.

man-of-war and a stay for other purposes. The commander and members of the crew on land officially in the service of their vessel, to buy provisions or to make other arrangements respecting the vessel, remain under the exclusive jurisdiction of their home State, even for crimes they commit on the spot. Although they may, if the case makes it necessary, be arrested to prevent further violence, they must at once be surrendered to the vessel. On the other hand, if they are on land not officially, but for purposes of pleasure and recreation, they are under the territorial supremacy of the riparian State like any other foreigners, and they may be punished for crimes committed ashore.

III

Agents without Diplomatic or Consular Character

Hall, §§ 103-104*—Bluntschli, §§ 241-243—Ullmann, §§ 56-57—Heffter, § 222—Rivier, I. § 44—Calvo, III. §§ 1337-1339—Fiore, II. Nos. 1188-1191—Martens, II. § 5.

Agents lacking diplomatic or consular character.

§ 452. Besides diplomatic envoys and consuls, States may and do send various kinds of agents abroad—namely, public political agents, secret political agents, spies, commissaries, bearers of despatches. Their position is not the same, but varies according to the class they belong to, and they must therefore be severally treated.

Public Political Agents.

§ 453. Public political agents are agents sent by one Power to another for political negotiations of different kinds. They may be sent for a permanency or for a limited time only. As they are not invested

with diplomatic character, they do not receive a Letter of Credence, but a letter of recommendation or commission only. They may be sent by one full-Sovereign State to another, but also by and to insurgents recognised as a belligerent Power, and by and to States under suzerainty. Public (or secret) political agents without diplomatic character are, in fact, the only means for personal political negotiations with such insurgents and States under suzerainty.

As regards the position and privileges of such agents, it is obvious that they enjoy neither the position nor the privileges of diplomatic envoys.[1] But, on the other hand, they have a public character, being admitted as public political agents of a foreign State. They must, therefore, certainly be granted a special protection, but no distinct rules concerning special privileges to be granted to such agents seem to have grown up in practice. Inviolability of their persons and official papers ought to be granted to them.[2]

Secret Political Agents.

§ 454. Secret political agents may be sent for the same purposes as public political agents. But two kinds of secret political agents must be distinguished. An agent may be secretly sent to another Power with a letter of recommendation and admitted by that Power. Such agent is a secret one in so far as third Powers do not know, or are not supposed to know, of his existence. As he is, although secretly, admitted by the receiving State, his position is essentially the same as that of a public political agent. On the

[1] Heffter, § 222, is, as far as I know, the only publicist who maintains that agents not invested with diplomatic character must nevertheless be granted the privileges of diplomatic envoys.

[2] Ullmann, § 56, and Rivier, I. § 40, maintain that they *must* be granted the privilege of inviolability to the same extent as diplomatic envoys.

other hand, an agent may be secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is fulfilling his task. Such agent has no recognised position whatever according to International Law. He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State. He may be expelled at any moment if he becomes troublesome, and he may be criminally punished if he commits a political or ordinary crime. Such secret agents are often abroad for the purpose of watching the movements of political refugees or partisans, or of Socialists, Anarchists, Nihilists, and the like. As long as such agents do not turn into so-called *agents provocateurs*, the local authorities will not interfere.

Spies.

§ 455. Spies are secret agents of a State sent abroad [1] for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all States constantly or occasionally send spies abroad, and although it is neither morally nor politically and legally considered wrong to send spies, such agents have, of course, no recognised position whatever according to International Law, since they are not agents of States for their international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. And the spy cannot legally excuse himself by pleading that he only executed the orders of his Government. The latter, on the other hand,

[1] Concerning spies in time of war, see below, vol. II. §§ 159 and 210.

will never interfere, since it cannot officially confess to having commissioned a spy.

Commissaries.

§ 456. Commissaries are agents sent with a letter of recommendation or commission by one State to another for negotiations, not of a political but of a technical or administrative character only. Such commissaries are, for instance, sent and received for the purpose of arrangements between the two States as regards railways, post, telegraphy, navigation, delineation of boundary lines, and so on. A distinct practice of guaranteeing certain privileges to such commissaries has not grown up, but inviolability of their persons and official papers ought to be granted to them, as they are officially sent and received for official purposes. Thus Germany, in 1887, in the case of the French officer of police Schnaebélé, who was invited by local German functionaries to cross the German frontier for official purposes and then arrested, recognised the rule that a safe-conduct is tacitly granted to foreign officials when they enter officially the territory of a State with the consent of the local authorities, although Schnaebélé was not a commissary sent by his Government to the German Government.

Bearers of Despatches.

§ 457. Individuals commissioned to carry official despatches from a State to its head or to diplomatic envoys abroad are agents of such State. Despatch-bearers who belong to the retinue of diplomatic envoys as their couriers must enjoy, as stated above (§ 405), exemption from civil and criminal jurisdiction and a special protection in the State to which the envoy is accredited, and a right of innocent passage through third States. But bearers of official despatches who are not in the retinue of the diplomatic envoys employing them must nevertheless be granted

inviolability for their person and official papers, provided they possess special passports stating their official character as despatch-bearers. And the same is valid respecting bearers of despatches between the head of a State who is temporarily abroad and his Government at home.

IV

International Commissions

Rivier, I. pp. 564-566—Ullmann, § 58—Gareis, §§ 51-52—Liszt, § 16.

Permanent in Contradistinction to Temporary Commissions.

§ 458. A distinction must be made between temporary and permanent international commissions. The former consist of commissaries delegated by two or more States to arrange all kinds of non-political matters, such as railways, post, telegraphy, navigation, boundary lines, and the like. Such temporary commissions dissolve as soon as their purpose is realised.[1] Besides temporary commissions, there are, however, permanent commissions in existence. They have been instituted by the Powers in the interest of free navigation on two international rivers and the Suez Canal; further, in the interest of international sanitation; thirdly, in the interest of the foreign creditors of several States unable to pay the interest on their

[1] The position of their members has been discussed above, § 456. Quite novel institutions are the International Commissions of Inquiry recommended by the Hague Peace Conference of 1899. Articles 9 to 14 of the Hague Convention for the peaceful adjustment of international differences provide that, in international differences involving neither honour nor vital interests, and arrising from a difference of opinion on matters of fact, the parties should institute an International Commission of Inquiry; this commission to present a report to the parties, which shall be limited to a statement of the facts. (See below, vol. II. § 5.)

stocks; and, lastly, concerning the treatment of sugar.

Commissions in the interest of Navigation.

§ 459. Four international commissions have been instituted in the interest of navigation—namely, two for the river Danube, one for the Congo river, and one for the Suez Canal.

1. With regard to the navigation on the Danube, the European Danube Commission was instituted by article 16 of the Peace Treaty of Paris in 1856. This commission, whose members are appointed by the signatory Powers of the Treaty of Paris, was reconstituted by the Berlin Conference in 1878 and again by the Conference of London in 1883. The commission is totally independent of the territorial Governments, its rights are clearly defined, and its members, offices, and archives enjoy the privilege of inviolability. The competence of the European Danube Commission comprehends the Danube from Ibraila downwards to its mouth.[1]

2. The above-mentioned London Conference of 1883 has sanctioned regulations[2] in regard to the navigation and river-police of the Danube from the Iron Gates down to Ibraila, and has, by article 96 of these regulations, instituted the Mixed Commission of the Danube for the observance of the regulations. The members of this Commission are delegates from Austria-Hungary, Bulgaria, Roumania, Servia, and the European Danube Commission—one member from each.[3]

3. The Powers represented at the Berlin Congo Conference of 1884 have sanctioned certain regulations in regard to navigation on the Congo river, and have, by articles 17–21 of the General Act of

[1] Details in Twiss, I. §§ 150–152.
[2] Martens, N.R.G., 2nd ser. IX. p. 394.
[3] Details in Twiss, § 152.

the Conference, instituted an International Commission of the Congo for the observance of these regulations. This Commission, in which every signatory Power may be represented by one member, is totally independent of the territorial Governments, and its members, offices, and archives enjoy the privilege of inviolability.[1]

4. By article 8 of the Treaty of Constantinople of 1888 in regard to the neutralisation of the Suez Canal, a Commission was instituted for the supervision of the execution of that treaty. The Commission consists of all the consuls of the signatory Powers in Egypt.[2]

Commissions in the interest of Sanitation.

§ 460. Three international commissions in the interest of sanitation are in existence. For the purpose of supervising the sanitary arrangements in connection with the navigation on the lower part of the Danube, the International Council of Sanitation was instituted at Bucharest in 1881.[3] The *Conseil supérieur de santé* at Constantinople has the task of supervising the arrangements concerning cholera and plague. The *Conseil sanitaire maritime et quarantenaire* at Alexandria has similar tasks and is subject to the control of the *Conseil supérieur de santé* at Constantinople.[4]

Commissions in the Interest of Foreign Creditors.

§ 461. Three international commissions in the interest of foreign creditors are in existence—namely, in Turkey since 1878, in Egypt since 1880, and in Greece since 1897.[5]

[1] Details in Calvo, I. § 334. According to Liszt, § 16, II. 2, this Commission has never been appointed.

[2] See above, § 183.

[3] See Article 6 of the *Acte additionnel à l'Acte public du 2 novembre* 1865 *pour la navigation des embouchures du Danube*, signed on May 28, 1881; Martens, N.R.G. 2nd ser. VIII. p. 207.

[4] Details in Liszt, § 16, III.

[5] See Murat, *Le contrôle international sur les finances de l'Egypte, de la Grèce et de la Turquie* (1899).

Permanent Commission concerning Sugar.

§ 462. According to article 7 of the Brussels Convention concerning bounties on sugar, a permanent commission was instituted in 1902 at Brussels.[1]

V

International Offices

Rivier, I. pp. 564-566—Ullmann, § 58—Liszt, § 17—Gareis, § 52—Descamps, "Les offices internationaux et leur avenir" (1894).

Character of International Offices.

§ 463. During the second half of the nineteenth century a great number of States constituted by international treaties so-called unions for non-political purposes. The business of these unions is transacted by international offices created specially for that purpose. The functionaries of these offices enjoy, however, ordinarily no privilege whatever. There are at present nine international offices in existence, exclusive of the International Bureau of Arbitration,[2] which, although an international office, has no relation with those here discussed.

International Telegraph Office.

§ 464. In 1868 was created the international telegraph office of the International Telegraph Union at Berne. It is administered by four functionaries under the supervision of the Swiss Bundesrath. It edits the "Journal Télégraphique" in French.[3]

International Post Office.

§ 465. The pendant of the international telegraph office is the international post office of the Universal Postal Union at Berne, founded in 1874. It is administered by seven functionaries under the supervision of the Swiss Bundesrath and edits a monthly, "L'Union Postale," in French, German, and English.[4]

[1] See below, § 591.
[2] See below, § 474.
[3] See below, § 580.
[4] See below, § 579.

International Office of Weights and Measures.

§ 466. The States which have introduced the metric system of weights and measures created in 1875 the international office of weights and measures in Paris. Of functionaries there are a director and several assistants. Their task is the custody of the international prototypes of the mètre and kilogramme and the comparison of the national prototypes with the international.[1]

International Office for the Protection of Works of Literature and Art and of Industrial Property.

§ 467. In 1883 an International Union for the Protection of Industrial Property, and in 1886 an International Union for the Protection of Works of Literature and Art, were created, with an international office in Berne. There are a secretary-general and three assistants, who edit a monthly, "Le Droit d'Auteur," in French.[2]

International Maritime Office at Zanzibar.

§ 468. For the purpose of abolishing the slave trade the Brussels Conference of 1890 created an international maritime office at Zanzibar. Every signatory Power has a right to be represented at this office by a delegate.

International Office of Customs Tariffs.

§ 469. The International Union for the Publication of Customs Tariffs, concluded in 1890, has created an international office at Brussels. There are a director, a secretary, and ten translators. The office edits the "Bulletin des Douanes" in French, German, English, Italian, and Spanish.[3]

Central Office of International Transports.

§ 470. Nine States—namely, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Luxemburg, Russia, Switzerland—entered in 1890 into an international convention in regard to transports and freights on railways and have created the "Office Central des Transports Internationaux" at Berne.[4]

[1] See below, § 582.
[2] See below, §§ 583–584.
[3] See below, § 585.
[4] See below, § 581.

Permanent Office of the Sugar Convention.

§ 471. The States which concluded on March 5, 1902, at Brussels the Convention concerning bounties on sugar [1] have, in compliance with article 7 of this Convention, instituted a permanent office at Brussels. The task of this office, which is attached to the permanent commission,[2] also instituted by article 7, is to collect, translate, and publish information of all kinds respecting legislation on and statistics of sugar.

VI

The International Court of Arbitration

Organisation of Court in general.

§ 472. In compliance with articles 20 to 29 of the Hague Convention for the peaceful adjustment of international differences, the signatory Powers in 1900 organised the International Court of Arbitration at the Hague. This organisation comprises three distinct bodies—namely, the Permanent Administrative Council of the Court, the International Bureau of the Court, and the Court of Arbitration itself. But a fourth body must also be distinguished—namely, the tribunal to be constituted for the decision of every case.

The Permanent Council.

§ 473. The Permanent Council (article 28) consists of the diplomatic envoys of the signatory Powers accredited to the Netherlands and of the Dutch Secretary for Foreign Affairs, who acts as president of the Council. At least nine Powers must be represented at the Council. The task of the latter is the control of the International Bureau of the Court, the appointment, suspension, and dismissal of the *em-*

[1] See below, § 591.

[2] See above, § 462.

ployés of the bureau, and the decision of all questions of administration with regard to the operations of the Court. The Council has, further, the task of furnishing the signatory Powers with a report of the proceedings of the Court, the working of the administration, and the expenses. At meetings duly summoned, the presence of five members is sufficient to give the Council power to deliberate, and its decisions are taken by a majority of votes.

The International Bureau.

§ 474. The International Bureau (article 22) serves as the Registry for the Court. It is the intermediary for communications relating to the meetings of the Court. It has the custody of the archives and the conduct of all the administrative business of the Court. The signatory Powers have to furnish the Bureau with a certified copy of every stipulation concerning arbitration arrived at between them, and of any award concerning them rendered by a special tribunal, &c. The Bureau is (article 26) authorised to place its premises and its staff at the disposal of the signatory Powers for the work of any special[1] tribunal of arbitration not constituted within the International Court of Arbitration. The expense (article 29) of the Bureau is borne by the signatory Powers in the proportion established for the International Office of the International Postal Union.

The Court of Arbitration.

§ 475. The Court of Arbitration (article 23) consists of a large number of individuals "of recognised competence in questions of International Law, enjoying the highest moral reputation," selected and appointed by the signatory Powers. No more than four members may be appointed by one Power, but two or more Powers may unite in the appointment of one or more members, and the same individual may

[1] See below, vol. II. § 20.

be appointed by different Powers. Every member is appointed for a term of six years, but his appointment may be renewed. The place of a resigned or deceased member is to be refilled by the respective Powers. The names of the members of the Court thus appointed are enrolled upon a general list, which is to be kept up to date and communicated to all the signatory Powers. The Court thus constituted has jurisdiction over all cases of arbitration, unless there shall be an agreement between the parties for a special tribunal of arbitrators not selected from the list of the members of the Court (article 21).

The Deciding Tribunal.

§ 476. The Court of Arbitration does not as a body decide the cases brought before it, but a tribunal is created for every special case by selection of a number of arbitrators from the list of the members of the Court. This tribunal (article 24) may be created directly by agreement of the parties. If this is not done, the tribunal is formed in the following manner. Each party selects two names from the list, and the four arbitrators so appointed choose a fifth as umpire and president. If the votes of the four are equal, the parties entrust to a third Power the choice of the umpire.

If the parties cannot agree in their choice of such third Power, each party nominates a different Power, and the umpire is chosen by the united action of the Powers thus nominated. After this is done, the tribunal is constituted, and the parties communicate to the International Bureau of the Court the names of the members of the tribunal, which meets at the time fixed by the parties. The members of the tribunal must be granted the privileges of diplomatic envoys when discharging their duties outside their own country. The tribunal sits ordinarily at the Hague,

and, except in case of *force majeure*, the place of session can only be altered by the tribunal with the assent of the parties (article 25). But the parties can from the beginning designate another place than the Hague as the venue of the tribunal (article 36). The expenses of the tribunal are paid by the parties in equal shares (article 57).[1]

[1] The procedure to be followed by and before the tribunal is described below, vol. II. § 27.

PART IV

INTERNATIONAL TRANSACTIONS

CHAPTER I

ON INTERNATIONAL TRANSACTIONS IN GENERAL

I

Negotiation

Heffter, §§ 234-239—Geffcken in Holtzendorff, III. pp. 668-676—Liszt, § 20—Ullmann, § 59—Bonfils, Nos. 792-795—Pradier-Fodéré, III. Nos. 1354-1362—Rivier, II. § 45—Calvo, III. §§ 1316-1320, 1670-1673.

Conception of Negotiation.

§ 477. International negotiation is the term for such intercourse between two or more States as is initiated and directed for the purpose of effecting an understanding between them on matters of interest. Since civilised States form a body interknitted through their interests, such negotiation is constantly going on in some shape or other. No State of any importance can abstain from it in practice. There are many other international transactions,[1] but negotiation is by far the most important of them. And it must be emphasised that negotiation as a means of amicably settling conflicts between two or more States is only a particular kind of negotiation, although it will be specially discussed in another part of this work.[2]

Parties to Negotiation.

§ 478. International negotiations can be conducted by all such States as have a standing within the Family of Nations. Full-Sovereign States are, therefore, the regular subjects of international negotiation.

[1] See below, §§ 486-490.

[2] See below vol. II. §§ 4-6.

But it would be wrong to maintain that half- and part-Sovereign States can never be parties to international negotiations. For they can indeed conduct negotiations on those points concerning which they have a standing within the Family of Nations. Thus, for instance, Bulgaria can, in spite of her being a half-Sovereign State only, negotiate with foreign States independently of Turkey on several matters.[1] But so-called colonial States, as the Dominion of Canada, can never be parties to international negotiations; any necessary negotiation for a colonial State must be conducted by the mother-State to which it internationally belongs.[2]

It must be specially mentioned that such negotiation as is conducted between a State, on the one hand, and, on the other, a party which is not a State, is not *international* negotiation, although such party may reside abroad. Thus, negotiations of a State with the Pope and the Holy See are not international negotiations, although all the formalities connected with international negotiations are usually in this case observed. Thus, too, negotiations on the part of States with a body of foreign bankers and contractors concerning a loan, the building of a railway, the working of a mine, and the like, are not international negotiations.

Purpose of Negotiation.

§ 479. Negotiations between States may have various purposes. The purpose may be an exchange of views only on some political question or other; but it may also be an arrangement as to the line of action to be taken in future with regard to a certain point,

[1] See above, § 91.

[2] The demand on the part of many influential Canadian politicians, expressed after the verdict of the Arbitration Court in the Alaska Boundary dispute, that Canada should have the power of making treaties independently of Great Britain, includes necessarily the demand to become in some respects a Sovereign State.

or a settlement of differences, or the creation of international institutions, such as the Universal Postal Union for example, and so on. Of the greatest importance are those negotiations which aim at an understanding between members of the Family of Nations respecting the very creation of rules of International Law by international conventions. Since the Vienna Congress at the beginning of the nineteenth century negotiations between the Powers for the purpose of defining, creating, or abolishing rules of International Law have frequently and very successfully been conducted.[1]

Negotiations by whom conducted.

§ 480. International negotiations are conducted by the organs which represent the negotiating States. The heads of these States may conduct the negotiations in person, either by letters or by a personal interview. Serious negotiations have in the past been conducted by heads of States, and, although this is comparatively seldom done, there is no reason to believe that personal negotiations between heads of States will not occur in future.[2] Heads of States may also personally negotiate with diplomatic or other agents commissioned for that purpose by other States. Ambassadors, as diplomatic agents of the first class, must, according to International Law, have even the right to approach in person the head of the State to which they are accredited for the purpose of negotiation.[3] The rule, however, is that negotiation between States concerning more important matters is conducted by their Secretaries for Foreign Affairs, with the help either of their diplomatic envoys or of agents without diplomatic character and so-called commissaries.[4]

[1] See below, §§ 555–568.
[2] See below, § 495.
[3] See above, § 365.
[4] Negotiations between armed

Form of Negotiation.

§ 481. The Law of Nations ignores any particular form in which international negotiations must necessarily be conducted. Such negotiations may, therefore, take place *viva voce* or through the exchange of written representations and arguments or both. The more important negotiations are regularly conducted through the diplomatic exchange of written communications, as only in this way can misunderstandings be avoided, which easily arise during *viva-voce* negotiations. Of the greatest importance are the negotiations which take place through congresses and conferences.[1]

During *viva-voce* negotiations it happens sometimes that a diplomatic envoy negotiating with the Secretary for Foreign Affairs reads out a letter received from his home State. In such case it is usual to leave a copy of the letter at the Foreign Office. If a copy is refused, the Secretary for Foreign Affairs can on his part refuse to hear the letter read. Thus in 1825 Canning refused to listen to a Russian communication to be read to him by the Russian Ambassador in London with regard to the independence of the former Spanish colonies in South America, because this Ambassador was not authorised to leave a copy of the communication at the British Foreign Office.[2]

End and Effect of Negotiation.

§ 482. Negotiations may and often do come to an end without any effect whatever on account of the parties failing to agree. On the other hand, if negotiations lead to an understanding, the effect may be twofold. It may consist either in a satisfactory exchange of views and intentions, and the parties are

forces of belligerents are regularly conducted by soldiers. See below, vol. II. §§ 220–240.

[1] See below, § 483.

[2] As regards the language used during negotiation, see above, § 359.

then in no way, legally at least, bound to abide by such views and intentions, or to act on them in the future; or in an agreement on a treaty, and then the parties are legally bound by the stipulations of such treaty. Treaties are of such importance that it is necessary to discuss them in a special chapter.[1]

II

Congresses and Conferences

Phillimore, II. §§ 39-40—Twiss, II. § 8—Taylor, §§ 34-36—Bluntschli, § 12—Heffter, § 242—Geffcken in Holtzendorff, III. pp. 679-684—Ullmann, §§ 60-61—Bonfils, Nos. 796-814—Despagnet, Nos. 484-488—Pradier-Fodéré, VI. Nos. 2593-2599—Rivier, II. § 46—Calvo, III. §§ 1674-1681—Fiore, II. Nos. 1216-1224—Martens, I. § 52—Charles de Martens, "Guide Diplomatique," vol. I. § 58—Pradier-Fodéré, "Cours de droit diplomatique" (1881), vol. II. pp. 372-424—Zaleski, "Die völkerrechtliche Bedeutung der Congresse" (1874).

Conception of Congresses and Conferences.

§ 483. International congresses and conferences are formal meetings of the representatives of several States for the purpose of discussing matters of international interest and coming to an agreement concerning these matters. As far as language is concerned, the term "congress" as well as "conference" may be used for the meetings of the representatives of only two States, but regularly congresses or conferences denote such bodies only as are composed of the representatives of a greater number of States. Several writers[2] allege that there are characteristic differences between a congress and a conference. But all such alleged differences vanish in face of the

[1] See below, §§ 491-554.

[2] See, for instance, Martens, I. § 52, and Fiore, II. §§ 1216-1224.

fact that the Powers, when summoning a meeting of representatives, name such body either congress or conference indiscriminately. It is not even correct to say that the more important meetings are named congresses, in contradistinction to conferences, for the Hague Peace Conference of 1898 was, in spite of its grand importance, denominated a conference.

Much more important than the mere terminological difference between congress and conference is the difference of the representatives who attend the meeting. For it may be that the heads of the States meet at a congress or conference, or that the representatives consist of diplomatic envoys and Secretaries for Foreign Affairs of the Powers. But, although congresses and conferences of heads of States have been held in the past and might at any moment be held again in the future, there can be no doubt that the most important matters are treated by congresses and conferences consisting of diplomatic representatives of the Powers.

Parties to Congresses and Conferences.

§ 484. Congresses and conferences not being organised by customary or conventional International Law, no rules exist with regard to the parties of a congress or conference. Everything depends upon the purpose for which a congress or a conference meets, and upon the Power which invites other Powers to the meeting. If it is intended to settle certain differences, it is reasonable that all the States concerned should be represented, for a Power which is not represented need not consent to the resolutions of the congress. If the creation of new rules of International Law is intended, at least all full-Sovereign members of the Family of Nations ought to be represented. To the Peace Conference at the Hague, nevertheless, only the majority of States were

invited to send representatives, the South American Republics not being invited at all.

It is frequently maintained that only full-Sovereign States can be parties to congresses and conferences. This is certainly not correct, as here, too, everything depends upon the merits of the special case. As a rule, full-Sovereign States only are parties, but there are exceptions. Thus, Bulgaria, a vassal under Turkish suzerainty, was a party to the Hague Peace Conference, although without a vote. There is no reason to deny the rule that half- and part-Sovereign States can be parties to congresses and conferences in so far as they are able to negotiate internationally.[1] Such States are, in fact, frequently asked to send representatives to such congresses and conferences as meet for non-political matters.

But no State can be a party which has not been invited, or admitted at its own request. If a Power thinks it fitting that a congress or conference should meet, it invites such other Powers as it pleases. The invited Powers may accept under the condition that certain other Powers should or should not be invited or admitted. Those Powers which have accepted the invitation become parties if they send representatives. Each party may send several representatives, but they have only one vote, given by the senior representative for himself and his subordinates.

Procedure at Congresses and Conferences.

§ 485. After the place and time of meeting have been arranged—such place may be neutralised for the purpose of securing the independence of the deliberations and discussions—the representatives meet and constitute themselves by exchanging their commissions and electing a president and other

[1] See above, § 478.

officers. It is usual, but not obligatory, for the Secretary for Foreign Affairs of the State within which the congress meets to be elected president. If the difficulty of the questions on the programme makes it advisable, special committees are appointed for the purpose of preparing the matter for discussion by the body of the congress. In such discussion all representatives can take part. After the discussion follows the voting. The motion must be carried unanimously to consummate the task of the congress, for the vote of the majority has no power whatever in regard to the dissenting parties. But it is possible that the majority considers the motion binding for its members. A protocol is to be kept for all the discussions and the voting. If the discussions and votings lead to a final result upon which the parties agree, all the points agreed upon are drawn up in an Act, which is signed by the representatives and which is called the Final Act or the General Act of the congress or conference. A party can make a declaration or a reservation in signing the Act for the purpose of excluding a certain interpretation of the Act in the future. And the Act may expressly stipulate freedom for States which were not parties to accede to it in future.

III

Transactions besides Negotiation

Bluntschli, § 84—Hartmann, § 91—Gareis, § 77—Liszt, § 20.

Different kinds of Transaction.

§ 486. International transaction is the term for every act on the part of a State in its intercourse with other States. Besides negotiation, which has been discussed above in §§ 477–482, there are eleven other kinds of international transactions which are of legal importance—namely, declaration, notification, protest, renunciation, recognition, intervention, retorsion, reprisals, pacific blockade, war, and subjugation. Recognition has already been discussed above in §§ 71–75, as has also intervention in §§ 134–138, and, further, subjugation in §§ 236–241. Retorsion, reprisals, pacific blockade, and war will be treated in the second volume of this work. There are, therefore, here to be discussed only the remaining four transactions—namely, declaration, notification, protest, and renunciation.

Declaration.

§ 487. The term "declaration" is used in three different meanings. It is, first, sometimes used as the title of a body of stipulations of a treaty according to which the parties engage themselves to pursue in future a certain line of conduct. The Declaration of Paris, 1856, and the Declaration of St. Petersburg, 1868, are instances of this. Declarations of this kind differ in no respect from treaties.[1] One speaks, secondly, of declarations when States communicate to other States or *urbi et orbi* an explanation and justification of a line of conduct pursued by them in the past, or an explanation

[1] See below, § 508.

of views and intentions concerning certain matters. Declarations of this kind may be very important, but they hardly comprise transactions out of which rights and duties of other States follow. But there is a third kind of declarations out of which rights and duties do follow for other States, and it is this kind which comprises a specific international transaction, although the different declarations belonging to this group are by no means of a uniform character. Declarations of this kind are declarations of war, declarations on the part of belligerents concerning the goods they will condemn as contraband, declarations at the outbreak of war on the part of third States that they will remain neutral, and others.

Notification.

§ 488. Notification is the technical term for the communication to other States of the knowledge of certain facts and events of legal importance. In principle, no notification is obligatory, but in fact it frequently takes place, because States cannot be considered subject to certain duties without the knowledge of the facts and events which give rise to these duties. Thus it is usual to notify to other States changes in the headship and in the form of government of a State, the outbreak of war, the establishment of a Federal State, a blockade, an annexation after conquest, the appointment of a new Secretary for Foreign Affairs, and the like. But although notification is as a rule not obligatory, there are some exceptions to the rule. Thus, according to article 56 of the Hague Convention for the peaceful adjustment of international differences, in case a number of States are parties to a treaty and two of the parties are at variance concerning the interpretation of such treaty and agree to have the

difference settled by arbitration, they have to notify this agreement to all other parties to the treaty. Thus, too, according to article 34 of the General Act of the Berlin Congo Conference of 1885, notification of new occupations and the like on the African coast is obligatory.

Protest.

§ 489. Protest is a formal communication on the part of a State to another that it objects to an act performed or contemplated by the latter. A protest serves the purpose of preservation of rights, or of making it known that the protesting State does not acquiesce in and does not recognise certain acts. A protest can be lodged with another State concerning acts of the latter which have been notified to the former or which have otherwise become known. On the other hand, if a State acquires knowledge of an act which it considers internationally illegal and against its rights, and nevertheless does not protest, such attitude implies renunciation of such rights, provided a protest would have been necessary to preserve a claim. It may further happen that a State at first protests, but afterwards either expressly [1] or tacitly acquiesces in the act. And it must be emphasised that under certain circumstances and conditions a simple protest on the part of a State without further action is not in itself sufficient to preserve the rights in behalf of which the protest was made.[2]

Renunciation.

§ 490. Renunciation is the deliberate abandonment of rights. It can be given *expressis verbis* or tacitly.

[1] Thus by section 2 of the Declaration concerning Siam, Madagascar, and the New Hebrides, which is embodied in the Anglo-French Agreement of April 8, 1904, Great Britain withdrew the protest which she had raised against the introduction of the Customs tariff established at Madagascar after the annexation to France (see below, p. 594).

[2] See below, § 539, concerning the withdrawal of Russia from article 59 of the Treaty of Berlin, 1878, stipulating the freedom of the port of Batoum.

If, for instance, a State by occupation takes possession of an island which has previously been occupied by another State,[1] the latter tacitly renounces its rights by not protesting as soon as it receives knowledge of the fact. Renunciation plays a prominent part in the amicable settlement of differences between States, either one or both parties frequently renouncing their claims for the purpose of coming to an agreement. But it must be specially observed that mere silence on the part of a State does not imply renunciation; this occurs only when a State remains silent, although a protest is necessary to preserve a claim.

[1] See above, § 247.

CHAPTER II

TREATIES

I

Character and Function of Treaties

Vattel, II. §§ 152, 153, 157, 163—Hall, § 107—Phillimore, II. § 44—Twiss, I. §§ 224-233—Taylor, §§ 341-342—Bluntschli, § 402—Heffter, § 81—Despagnet, Nos. 444-445—Pradier-Fodéré, II. Nos. 888-919—Rivier, II. pp. 33-40—Calvo, III. §§ 1567-1584—Fiore, II. Nos. 976-982—Martens, I. § 103—Bergbohm, "Staatsverträge und Gesetze als Quellen des Völkerrechts" (1877)—Jellinek, "Die rechtliche Natur der Staatenverträge" (1880)—Laghi, "Teoria dei trattati internazionali" (1882)—Buonamici, "Dei trattati internazionali" (1888)—Nippold, "Der völkerrechtliche Vertrag" (1894)—Triepel, "Völkerrecht und Landesrecht" (1899), pp. 27-90.

Conception of Treaties.

§ 491. International treaties are conventions or contracts between two or more States concerning various matters of interest. Even before a Law of Nations in the modern sense of the term was in existence, treaties used to be concluded between States. And although in those times treaties were neither based on nor were themselves a cause of an International Law, they were nevertheless considered sacred and binding on account of religious and moral sentiment. However, since the manifold intercourse of modern times did not then exist between the different States, treaties did not discharge such all-important functions in the life of humanity as they do now.

Different kinds of Treaties.

§ 492. These important functions are manifest if attention is given to the variety of international treaties which exist nowadays and are day by day

concluded for innumerable purposes. In regard to State property, treaties are concluded of cession, of boundary, and many others. Alliances, treaties of protection, of guarantee, of neutrality, of peace are concluded for political purposes. Various purposes are served by consular treaties, commercial[1] treaties, treaties in regard to the post, telegraphs, and railways, treaties of copyright and the like, of jurisdiction, of extradition, monetary treaties, treaties in regard to measures and weights, to rates, taxes, and custom-house duties, treaties on the matter of sanitation with respect to epidemics, treaties in the interest of industrial labourers, treaties with regard to agriculture and industry. Again, various purposes are served by treaties concerning warfare, mediation, arbitration, and so on.

I do not intend to discuss the question of classification of the different kinds of treaties, for hitherto all attempts[2] at such classification have failed. But there is one distinction to be made which is of the greatest importance and according to which the whole body of treaties is to be divided into two classes. For treaties may, on the one hand, be concluded for the purpose of confirming, defining, or abolishing existing customary rules, and of establishing new rules for the Law of Nations. Treaties of this kind ought to be termed *law-making* treaties. On the other hand, treaties may be concluded for all kinds of other purposes. Law-making treaties as a source of rules of International Law have been

[1] They frequently embody the so-called *most favoured nation clause*. See below, § 522.

[2] Since the time of Grotius the science of the Law of Nations has not ceased attempting a satisfactory classification of the different kinds of treaties. See Heffter, §§ 88–91; Bluntschli, §§ 442–445; Martens, I. § 113; Ullmann, § 70; Wheaton, § 268 (following Vattel, II. § 169); Rivier, II. pp. 106–118; Westlake, I. p. 283, and many others.

discussed above (§ 18); the most important of these treaties will be considered below (§§ 556–568).

Binding Force of Treaties.

§ 493. The question as to the reason of the binding force of international treaties always was, and still is, very much disputed. That all those publicists who deny the legal character of the Law of Nations deny likewise a legally binding force in international treaties is obvious. But even among those who acknowledge the legal character of International Law, unanimity by no means exists concerning this binding force of treaties. The question is all the more important as everybody knows that treaties are frequently broken, rightly according to the opinion of the one party, and wrongly according to the opinion of the other. Many publicists find the binding force of treaties in the Law of Nature, others in religious and moral principles, others [1] again in the self-restraint exercised by States in becoming a party to a treaty. Some writers [2] assert that it is the contracting parties' own will which gives binding force to their treaties, and others [3] teach that such binding force is to be found *im Rechtsbewusstsein der Menschheit*—that is, in the idea of right innate in man. I believe that the question can satisfactorily be dealt with only by dividing it into several different questions and by answering those questions *seriatim*.

First, the question is to be answered why treaties are legally binding. The answer must categorically be that this is so because there exists a customary rule of International Law that treaties are binding.

Then the question might be put as to the cause

[1] So Hall, § 107; Jellinek, Staatenverträge, p. 31; Nippold, § 11.

[2] So Triepel, Völkerrecht und Landesrecht (1899), p. 82.

[3] So Bluntschli, § 410.

of the existence of such customary rule. The answer must be that such rule is the product of several joint causes. Religious and moral reasons require such a rule quite as much as the interest of the States, for no law could exist between nations if such rule did not exist. All causes which have been and are still working to create and maintain an International Law are at the background of this question.

And, thirdly, the question might be put how it is possible to speak of a legally binding force in treaties without a judicial authority to enforce their stipulations. The answer must be that the binding force of treaties, although it is a legal force, is not the same as the binding force of contracts according to Municipal Law, since International Law is a weaker law, and for this reason less enforceable, than Municipal Law. But just as International Law does not lack legal character in consequence of the fact that there is no central authority [1] above the States which could enforce it, so international treaties are not deficient of a legally binding force because there is no judicial authority for the enforcement of their stipulations.

[1] See above, § 5.

II

Parties to Treaties

Vattel, II. §§ 154–156, 206–212—Hall, § 108—Westlake, I. p. 279—Phillimore, II. §§ 48–49—Halleck, I. pp. 275–278—Taylor, §§ 361–365—Wheaton, §§ 265–267—Bluntschli, §§ 403–409—Heffter, §§ 84–85—Ullmann, § 63—Bonfils, No. 818—Despagnet, No. 447—Pradier-Fodéré, II. Nos. 1058–1068—Rivier, II. pp. 45–48—Calvo, III. §§ 1616–1618—Fiore, II. Nos. 984–1000—Martens, I. § 104—Nippold, l. c. pp. 104–112.

The Treaty-making Power.

§ 494. The so-called right of making treaties is not a right of a State in the technical meaning of the term, but a mere competence attaching to sovereignty. A State possesses, therefore, treaty-making power only so far as it is sovereign. Full-Sovereign States may become parties to treaties of all kinds, being regularly competent to make treaties on whatever objects they please. Not-full Sovereign States, however, can become parties to such treaties only according to their competence to conclude. It is impossible to lay down a hard and fast rule concerning such competence of all not-full Sovereign States. Everything depends upon the special case. Thus, the constitutions of Federal States comprise provisions with regard to the competence, if any, of the member-States to conclude international treaties among themselves as well as with foreign States.[1] Thus, again, it

[1] According to articles 7 and 9 of the Constitution of Switzerland the Swiss member-States are competent to conclude non-political treaties among themselves, and, further, such treaties with foreign States as concern matters of police, of local traffic, and of State economics. According to article 11 of the Constitution of the German Empire, the German member-States are competent to conclude treaties concerning all such matters as do not, in conformity with article 4 of the Constitution, belong to the competence of the Empire. On the other hand, according to article 1, section 10, of the Constitution of the United States of America, the member-States are incompetent either to conclude treaties among themselves or with foreign States.

depends upon the special relation between the suzerain and the vassal how far the latter possesses the competence to enter into treaties with foreign States: ordinarily a vassal can conclude treaties concerning such matters as railways, extradition, commerce, and the like.

Treaty-making Power exercised by Heads of States.

§ 495. The treaty-making power of the States is exercised by their heads, either personally or through representatives appointed by these heads. The Holy Alliance of Paris, 1814, was personally concluded by the Emperors of Austria and Russia and the King of Prussia. And when, on June 24, 1859, the Austrian army was defeated at Solferino, the Emperors of Austria and France met on July 11, 1859, at Villafranca and agreed in person on preliminaries of peace. Yet, as a rule, heads of States do not act in person, but authorise representatives to act for them. Such representatives receive a written commission, known as powers or full powers, which authorises them to negotiate in the name of the respective heads of States. They also receive oral or written, open or secret instructions. But, as a rule, they do not conclude a treaty finally, for all treaties concluded by such representatives are in principle not valid before ratification.[1] If they conclude a treaty by exceeding their powers or acting contrary to their instructions, the treaty is not a real treaty and not binding upon the State they represent. A treaty of such a kind is called a *sponsio* or *sponsiones*. *Sponsiones* may become a real treaty and binding upon the State through the latter's approval. Nowadays, however, the difference between real treaties and *sponsiones* is less important than in former times, when the custom was not yet general in favour of

[1] See below, § 510.

the necessity of ratification for the validity of treaties. If nowadays representatives exceed their powers, their States can simply refuse ratification of the *sponsio*.

Minor Functionaries exercising Treaty-making Power.

§ 496. For some non-political purposes of minor importance, certain minor functionaries are recognised as competent to exercise the treaty-making power of their States. Such functionaries are *ipso facto* by their offices and duties competent to enter into certain agreements without the requirement of ratification. Thus, for instance, in time of war, military and naval officers in command can enter into agreements concerning a suspension of arms, the surrender of a fortress, the exchange of prisoners, and the like. But it must be emphasised that treaties of this kind are valid only when these functionaries have not exceeded their powers.

Constitutional Restrictions.

§ 497. Although the heads of States are regularly, according to the Law of Nations, the organs that exercise the treaty-making power of the States, constitutional restrictions imposed upon the heads concerning the exercise of this power are nevertheless of importance for the Law of Nations. Such treaties concluded by heads of States or representatives authorised by these heads as violate constitutional restrictions are not real treaties and do not bind the State concerned, because the representatives have exceeded their powers in concluding the treaties.[1] Such constitutional restrictions, although they are not of great importance in Great Britain,[2] play a prominent part in the Constitutions of most countries. Thus, according to article 8 of the

[1] The whole matter is discussed with great lucidity by Nippold, l. c. pp. 127–164.

[2] See Anson, The Law and Custom of the Constitution, II. (2nd ed.), pp. 297–300.

French Constitution, the President exercises the treaty-making power; but peace treaties and such other treaties as concern commerce, finance, and some other matters, are not valid without the co-operation of the French Parliament. Again, according to articles 1, 4, and 11 of the Constitution of the German Empire, the Emperor exercises the treaty-making power; but such treaties as concern the frontier, commerce, and several other matters, are not valid without the co-operation of the Bundesrath and the Reichstag.[1]

Mutual Consent of the Contracting Parties.

§ 498. A treaty being a convention, mutual consent of the parties is necessary. Mere proposals made by one party and not accepted by the other are, therefore, not binding upon the proposer. Without force are also pollicitations which contain mere promises without acceptance by the party to whom they were made. Not binding are, lastly, so-called *punctationes*, mere negotiations on the items of a future treaty, without the parties entering into an obligation to conclude that treaty. But such *punctationes* must not be confounded either with a preliminary treaty or with a so-called *pactum de contrahendo*. A preliminary treaty requires the mutual consent of the parties with regard to certain important points, whereas other points have to be settled by the definitive treaty to be concluded later on. Such preliminary treaty is a real treaty and therefore binding upon the parties. A *pactum de contrahendo* requires likewise the mutual consent of the parties. It is an agreement upon certain points to be incorporated in a future treaty, and is binding upon the parties. The difference between *punctationes* and a

[1] According to article 2, section 2, of the Constitution of the United States, the President can only conclude treaties with the consent of the Senate.

pactum de contrahendo is, that the latter stipulates an obligation of the parties to settle the respective points by a treaty, whereas the former does not.

Freedom of Action of consenting Representatives.

§ 499. As a treaty will lack binding force without real consent, absolute freedom of action on the part of the contracting parties is required. It must, however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty. The phrase "freedom of action" applies only to the *representatives* of the contracting States. It is *their* freedom of action in consenting to a treaty which must not have been interfered with and which must not have been excluded by other causes. A treaty concluded through intimidation exercised against the representatives of either party or concluded by intoxicated or insane representatives is not binding upon the party so represented. But a State which was forced by circumstances to conclude a treaty containing humiliating terms has no right afterwards to shake off the obligations of such treaty on the ground that its freedom of action was interfered with at the time. This must be emphasised, because in practice cases of similar repudiation have constantly occurred. A State may, of course, hold itself justified by political necessity in shaking off such obligations, but this does not alter the fact that such action is a breach of law.

Delusion and Error in Contracting Parties.

§ 500. Although a treaty was concluded with the real consent of the parties, it is nevertheless not binding if the consent was given in error, or under a delusion produced by a fraud of the other contracting

party. If, for instance, a boundary treaty were based upon an incorrect map or a map fraudulently altered by one of the parties, such treaty would by no means be binding. Although there is freedom of action in such cases, consent has been given under circumstances which render the treaty null and void.

III

Objects of Treaties

Vattel, II. §§ 160–162, 166—Hall, § 108—Phillimore, II. § 51—Walker, § 30—Bluntschli, §§ 410–416—Heffter, § 83—Ullmann, § 67—Bonfils, No. 819—Despagnet, No. 454—Pradier-Fodéré, II. Nos. 1080–1083—Rivier, II. pp. 57–63—Fiore, II. Nos. 1001–1004—Martens, I. § 110—Jellinek, "Die rechtliche Natur der Staatenverträge," pp. 59–60—Nippold, l. c. pp. 181–190.

Objects in general of Treaties.

§ 501. The object of treaties is always an obligation, whether mutual between all the parties or unilateral on the part of one only. Speaking generally, the object of treaties can be an obligation concerning any matter of interest for States. Since there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty. However, the Law of Nations prohibits some obligations from becoming objects of treaties, so that such treaties as comprise obligations of this kind are from the very beginning null and void.[1]

[1] The voidance *ab origine* of these treaties must not be confounded with voidance of such treaties as are valid in their inception, but become afterwards void on some ground or other. (See below, §§ 541–544.)

Obligations of Contracting Parties only can be Object.

§ 502. Obligations to be performed by a State other than a contracting party cannot be the object of a treaty. A treaty stipulating such an obligation would be null and void. But with this must not be confounded the obligation undertaken by one of the contracting States to exercise an influence upon another State to perform certain acts. The object of a treaty with such a stipulation is an obligation of one of the contracting States, and the treaty is therefore valid and binding.

An Obligation inconsistent with other Obligations cannot be an Object.

§ 503. Such obligation as is inconsistent with obligations from treaties previously concluded by one State with another cannot be the object of a treaty with a third State. Thus, in 1878, when after the war Russia and Turkey concluded the preliminary Treaty of Peace of San Stefano, which was inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, England protested,[1] and the Powers met at the Congress of Berlin to arrange matters by mutual consent.

Object must be physically possible.

§ 504. An obligation to perform a physical impossibility [2] cannot be the object of a treaty. If perchance a State entered into a convention stipulating an obligation of that kind, no right to claim damages for non-fulfilment of the obligation would arise for the other party, such treaty being legally null and void.

Immoral Obligations.

§ 505. It is a customarily recognised rule of the Law of Nations that immoral obligations cannot be the object of an international treaty. Thus, an alliance for the purpose of attacking a third State without provocation is from the beginning not binding. It cannot be denied that many treaties stipulating immoral obligations have been concluded and

[1] See Martens, N.R.G. 2nd ser. III. p. 257.

[2] See below, § 542.

executed in the past, but this does not alter the fact that such treaties were legally not binding upon the contracting parties. It must, however, be taken into consideration that the question as to what is immoral is often controversial. An obligation which is considered immoral by other States may not necessarily appear immoral to the contracting parties, and there is no Court that can decide the controversy.

Illegal Obligations.

§ 506. It is a unanimously recognised customary rule of International Law that obligations which are at variance with universally recognised principles of International Law cannot be the object of a treaty. If, for instance, a State entered into a convention with another State not to interfere in case the latter should appropriate a certain part of the Open Sea, or should command its vessels to commit piratical acts on the Open Sea, such treaty would be null and void, because it is a principle of International Law that no part of the Open Sea can be appropriated, and that it is the duty of every State to interdict to its vessels the commission of piracy on the High Seas.

IV

Form and Parts of Treaties

Grotius, II. c. 15 § 5—Vattel, II. § 153—Hall, § 109—Westlake, I. pp. 279–281—Wheaton, § 253—Bluntschli, §§ 417–427—Hartmann, §§ 46–47—Heffter, §§ 87–91—Ullmann, § 68—Bonfils, Nos. 821–823—Pradier-Fodéré, II. Nos. 1084–1099—Rivier, II. pp. 64–68—Fiore, II. Nos. 1004–1006—Martens, I. § 112—Jellinek, "Die rechtliche Natur der Staatenverträge," p. 56—Nippold, l. c. pp. 178–181.

No necessary Form of Treaties.

§ 507. The Law of Nations includes no rule which prescribes a necessary form of treaties. A treaty is, therefore, concluded as soon as the mutual consent

of the parties becomes clearly apparent. Such consent must always be given expressly, for a treaty cannot be concluded by tacit consent. But it matters not whether an agreement is made in writing, orally, or by symbols. Thus, in time of war, the exhibition of a white flag symbolises the proposal of an agreement as to a brief truce for the purpose of certain negotiations, and the acceptance of the proposal on the part of the other side through the exhibition of a similar symbol establishes a convention as binding as any written treaty. Thus, too, history tells of an oral treaty of alliance, secured by an oath, concluded in 1697 at Pillau between Peter the Great of Russia and Frederick III., Elector of Brandenburg.[1] Again, treaties are sometimes concluded through an exchange of diplomatic notes between the Secretaries for Foreign Affairs of two States or through the exchange of personal letters between the heads of two States. However, as a matter of reason, treaties usually take the form of a written[2] document signed by duly authorised representatives of the contracting parties.

Acts, Conventions, Declarations.

§ 508. International agreements which take the form of a written agreement are, besides treaties, sometimes termed *Acts*, sometimes *Conventions*, sometimes *Declarations*.[3] But there is no essential difference between them, and their binding force upon the contracting parties is the same whatever be their name. The Geneva Convention, the Declaration of Paris, and the final act of the Vienna Congress are as binding

[1] See Martens, I. § 112.

[2] The only writer who nowadays insists upon a *written* agreement for a treaty to be valid is, as far as I know, Bulmerincq (§ 56). But although all important treaties are naturally concluded in writing, the example of the agreements concluded between armed forces in time of war either orally or through symbols proves that the written form is not absolutely necessary.

[3] See above, § 487.

as any agreement which goes under the name of *Treaty*.

Parts of Treaties.

§ 509. Since International Law lays down no rules concerning the form of treaties, there exist no rules concerning the arrangement of the parts of written treaties. But the following order is usually observed. A first part, the so-called *preamble*, comprises the names of the heads of the contracting States, of their duly authorised representatives, and the motives for the conclusion of the treaty. A second part consists of the primary stipulations in numbered articles. A third part consists of miscellaneous stipulations concerning the duration of the treaty, its ratification, the accession of third Powers, and the like. The last part comprises the signatures of the representatives. But this order is by no means necessary. Sometimes, for instance, the treaty itself does not contain the very stipulations upon which the contracting parties have agreed, such stipulations being placed in an annex to the treaty. It may also happen that a treaty contains secret stipulations in an additional part, which is not made public with the bulk of the stipulations.[1]

[1] The matter is treated with all details by Pradier-Fodéré, II. §§ 1086–1096.

V

Ratification of Treaties

Grotius, II. c. 11, § 12—Pufendorf, III. c. 9, § 2—Vattel, II. § 156—Hall, § 110—Westlake, I. pp. 279-280—Lawrence, § 152—Phillimore, II. § 52—Twiss, I. § 214—Halleck, I. pp. 276-277—Taylor, §§ 364-367—Walker, § 30—Wharton, II, §§ 131-131 A—Wheaton, §§ 256-263—Bluntschli, §§ 420-421—Heffter, § 87—Gessner in Holtzendorff, III. pp. 15-18—Ullmann, § 66—Bonfils, Nos. 824-831—Pradier-Fodéré, II. Nos. 1100-1119—Rivier, II. § 50—Calvo, III. §§ 1627-1636—Fiore, II. No. 994—Martens, I. §§ 105-108—Wicquefort, "L'Ambassadeur et ses fonctions" (1680), II. Section XV.—Jellinek, "Die rechtliche Natur der Staatenverträge," pp. 53-56—Nippold, l. c. pp. 123-125—Wegmann, "Die Ratifikation von Staatsverträgen" (1892).

Conception and Function of Ratification.

§ 510. Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives. Although a treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, its binding force is regularly suspended till ratification is given. The function of ratification is, therefore, that it makes the treaty binding, and that, if it is refused, the treaty falls to the ground. As long as ratification is not given, the treaty is, although concluded, not perfect. Many writers[1] maintain that, as a treaty is not binding without ratification, it is the latter which really contains the mutual consent and really concludes the treaty. Before ratification, they maintain, there is no treaty concluded, but a mere mutual proposal agreed to to conclude a treaty. But this opinion does not accord with the real facts.[2] For the representatives are authorised and intend to

[1] See, for instance, Ullmann, § 66; Jellinek, p. 55; Nippold, p. 123; Wegmann, p. 11.

[2] The matter is very ably discussed by Rivier, II. pp. 74-76.

conclude a treaty by their signatures. The contracting States have always taken the standpoint that a treaty is concluded as soon as their mutual consent is clearly apparent. They have always made a distinction between their consent given by representatives and their ratification to be given afterwards, they have never dreamt of confounding both and considering their ratification their consent. It is for that reason that a treaty cannot be ratified in part, that no alterations of the treaty are possible through the act of ratification, that a treaty may be tacitly ratified by its execution, that a treaty always is dated from the day when it was duly signed by the representatives and not from the day of its ratification, that there is no essential difference between such treaties as want and such as do not want ratification.

Rationale for the Institution of Ratification.

§ 511. The rationale for the institution of ratification is another argument for the fact that the conclusion of the treaty by the representatives is to be distinguished from the confirmation given by the respective States through ratifying it. The reason is that States want to have an opportunity of re-examining not the single stipulations, but the whole effect of the treaty upon their interests. These interests may be of various kinds. They may undergo a change immediately after the signing of the treaty by the representatives. They may appear to public opinion in a different light from that in which they appear to the Governments, so that the latter want to reconsider the matter. Another reason is that treaties on many important matters are, according to the Constitutional Law of most States, not valid without some kind of consent of Parliaments. Governments must therefore have an opportunity of withdrawing

from a treaty in case Parliaments refuse their recognition. These two reasons have made, and still make, the institution of ratification a necessity for International Law.

Ratification regularly, but not absolutely, necessary.

§ 512. But ratification, although necessary in principle, is not always essential. Although it is now a universally recognised customary rule of International Law that treaties are regularly in need of ratification, even if the latter was not expressly stipulated, there are exceptions to the rule. For treaties concluded by such State functionaries [1] as have within certain narrow limits, *ipso facto* by their office, the power to exercise the treaty-making competence of their State do not want ratification, but are binding at once when they are concluded, provided the respective functionaries have not exceeded their powers. Further, treaties concluded by heads of States in person do not want ratification provided that they do not concern matters in regard to which constitutional restrictions [2] are imposed upon heads of States. And, lastly, it may happen that the contracting parties stipulate expressly, for the sake of a speedy execution of a treaty, that it shall be binding at once without ratifications being necessary. Thus, the Treaty of London of July 15, 1840, between Great Britain, Austria, Russia, Prussia, and Turkey concerning the pacification of the Turko-Egyptian conflict was accompanied by a secret protocol,[3] signed by the representatives of the parties, according to which the treaty was at once, without being ratified, to be executed. For the Powers were, on account of the victories of Mehemet Ali, very anxious to settle the conflict as quickly as possible.

[1] See above, § 496. [2] See above, § 497.
[3] See Martens, N.R.G., I. p. 163.

But it must be emphasised that renunciation of ratification is valid only if given by representatives duly authorised to make such renunciation. If the representatives have not received a special authorisation to dispense with ratification, then renunciation is not binding upon the States which they represent.

Space of Time for Ratification.

§ 513. No rule of International Law exists for the space of time within which ratification must be given or refused. If such space of time is not specially stipulated by the contracting parties in the very treaty, a reasonable space of time must be presumed as mutually granted. Without doubt, a refusal to ratify must be presumed from an unreasonable lapse of time without ratification having been made. In most cases, however, treaties which are in need of ratification contain nowadays a clause stipulating the reservation of ratification, and at the same time a space of time within which ratification shall take place.

Refusal of Ratification.

§ 514. The question now requires attention whether ratification can be refused on just grounds only or according to discretion. Formerly [1] it was maintained that ratification could not be refused in case the representatives had not exceeded their powers or violated their secret instructions. But nowadays there is probably no publicist who maintains that a State is in any case *legally* [2] bound not to refuse

[1] See Grotius, II. c. 11, § 12; Bynkershoek, Quaestiones juris publici, II. 7; Wicquefort, L'Ambassadeur, II. 15; Vattel, II. § 156; G. F. von Martens, § 48.

[2] This must be maintained in spite of Wegmann's (p. 32) assertion that a customary rule of the Law of Nations has to be recognised that ratification can regularly not be refused. The hair-splitting scholasticism of this writer is illustrated by a comparison between his customary rule for the non-refusal of ratification as arbitrarily constructed by himself, and the opinion which he (p. 11) emphatically defends that a treaty is concluded only by ratification.

ratification. Yet many insist that a State is, except for just reasons, in principle *morally* bound not to refuse ratification. I cannot, however, see the value of such a moral in contradistinction to a legal duty. The fact upon which everybody agrees is that International Law does in no case impose a duty of ratification upon a contracting party. A State refusing ratification will always have reasons for such line of action which appear just to itself, although they may be unjust in the eyes of others. In practice, ratification is given or withheld at discretion. But in the majority of cases, of course, ratification is never refused. A State which often and apparently wantonly refused ratification of treaties would lose all credit in international negotiations and would soon feel the consequences. On the other hand, it is impossible to lay down hard and fast rules respecting just and unjust causes of refusal of ratification. The interests at stake are so various, and the circumstances which must influence a State are so imponderable, that it must be left to the discretion of every State to decide the question for itself. Numerous examples of important treaties which have not found ratification can be given. It suffices to mention the Hay-Pauncefote Treaty between the United States and Great Britain regarding the proposed Nicaragua Canal, signed on February 5, 1900, which was ratified with modifications by the Senate of the United States, this being equivalent to refusal of ratification.

Form of Ratification.

§ 515. No rule of International Law exists which prescribes a necessary form of ratification. Ratification can therefore be given as well tacitly as expressly. Tacit ratification takes place when a State begins the execution of a treaty without

expressly ratifying it. Further, ratification may be given orally or in writing, although I am not aware of any case in which ratification was given orally. For it is usual for ratification to take the form of a document duly signed by the heads of the States concerned and their Secretaries for Foreign Affairs. It is usual to draft as many documents as there are parties to the convention, and to exchange these documents between the parties. Sometimes the whole of the treaty is recited *verbatim* in the ratifying documents, but sometimes only the title, preamble, and date of the treaty, and the names of the signatory representatives are cited. As ratification is the necessary confirmation only of an already existing treaty, the essential requirement in a ratifying document is merely that it refer clearly and unmistakeably to the treaty to be ratified. The citation of title, preamble, date, and names of the representatives is, therefore, quite sufficient to satisfy that requirement, and I cannot agree with those writers who maintain that the whole of the treaty ought to be recited *verbatim*.

Ratification by whom effected.

§ 516. Ratification is effected by those organs which exercise the treaty-making power of the States. These organs are regularly the heads of the States, but they can, according to the Municipal Law of some States, delegate the power of ratification for some parts of the globe to other representatives. Thus, the Viceroy of India is empowered to ratify treaties with certain Asiatic monarchs in the name of the King of Great Britain and Emperor of India, and the Governor-General of Turkestan has the same power for the Emperor of Russia.

In case the head of a State ratifies a treaty, although the necessary constitutional requirements

have not been previously fulfilled, as, for instance, in the case in which a treaty has not received the necessary approval from the Parliament of the said State, the question arises whether such ratification is valid or null and void. Many writers[1] maintain that such ratification is nevertheless valid. But this opinion is not correct, because it is clearly evident that in such a case the head of the State has exceeded his powers, and that, therefore, the State concerned cannot be held to be bound by the treaty.[2] The conflict between the United States and France in 1831, frequently quoted in support of the opinion that such ratification is valid, is not in point. It is true that the United States insisted on payment of the indemnity stipulated by a treaty which had been ratified by the King of France without having received the necessary approval of the French Parliament, but the United States did not maintain that the ratification was valid; she insisted upon payment because the French Government had admitted that such indemnity was due to her.[3]

Ratification cannot be partial and conditional.

§ 517. It follows from the nature of the ratification as a necessary confirmation of a treaty already concluded that ratification must be either given or refused, no conditional or partial ratification being possible. That occasionally a State tries to modify a treaty in ratifying it will not be denied, yet conditional[4] ratification is no ratification at all, but equivalent to refusal of ratification. Nothing, of

[1] See, for instance, Martens, § 107, and Rivier, II. p. 185.

[2] See above, § 497, and Nippold, p. 147.

[3] See Wharton, II. § 131 A, p. 20.

[4] The exclusion, by inserting the term *exclu*, of article 10 of the Hague Convention of 1899 for the adaptation of the Geneva Convention to maritime warfare must not be taken as an example of a partial ratification. The fact is that the signatory Powers agreed, *before the ratification was given*, that article 10 should

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course, prevents the other contracting party from entering into fresh negotiations in regard to such modifications; but it must be emphasised that such negotiations are negotiations for a new treaty, the old treaty having become null and void through its conditional ratification. On the other hand, no obligation exists for such party to enter into fresh negotiations, it being a fact that conditional ratification is identical with refusal of ratification, whereby the treaty falls to the ground. Thus, for instance, when the United States Senate on December 20, 1900, in ratifying the Hay-Pauncefote Treaty as regards the Nicaragua Canal, accepted modifying amendments, Great Britain did not accept the amendments and considered the treaty unratified.

Effect of Ratification.

§ 518. The effect of ratification is the binding force of the treaty. But the question arises whether the effect of ratification is retroactive, so that the treaty appears to be binding from the date when it is duly signed by the representatives. No unanimity exists among publicists as regards this question. As in all important cases treaties themselves stipulate the date from which they are to take effect, the question is chiefly of theoretical interest. The fact that ratification imparts the binding force to a treaty seems to indicate that ratification has regularly no retroactive effect. Different, however, is of course the case in which the contrary is expressly stipulated in the very treaty, and, again, the case when a treaty contains such stipulations as shall at once be executed, without waiting for the necessary ratification. Be this as it may, ratification makes

be excluded. This agreement altered the signed convention as regards one point, and the convention thus altered was then ratified.

a treaty binding only if the original consent was not given in error or under a delusion.[1] If, however, the ratifying State discovers such error or delusion and ratifies the treaty nevertheless, such ratification makes the treaty binding. And the same is valid as regards a ratification given to a treaty although the ratifying State knows that its representatives have exceeded their powers by concluding the treaty.

VI

Effect of Treaties

Hall, § 114—Lawrence, § 154—Halleck, I. pp. 279-281—Taylor, §§ 370-373—Wharton, II. § 137—Wheaton, § 266—Bluntschli, §§ 415-416—Hartmann, § 49—Heffter, § 94—Bonfils, Nos. 845-848—Despagnet, Nos. 456-457—Pradier-Fodéré, II. Nos. 1151-1155—Rivier, II. pp. 119-122—Calvo, III. §§ 1643-1648—Fiore, II. Nos. 1008-1009—Martens, I. §§ 65 and 114—Nippold, l. c. pp. 151-160.

Effect of Treaties upon Contracting Parties.

§ 519. By a treaty the contracting parties are in the first place concerned. The effect of the treaty upon them is that they are bound by its stipulations, and that they must execute it in all its parts. No distinction can be made between more and less important parts of the treaty as regards its execution. Whatever may be the importance or the insignificance of a part of a treaty, it must be executed with good faith, for the binding force of a treaty covers equally all its parts and stipulations.

Effect of Treaties upon the Subjects of the Parties.

§ 520. It must be emphasised that the binding force of a treaty concerns the contracting States only, and not their subjects. As International Law is a law between States only and exclusively, treaties

[1] See above, § 500.

can have effect upon States and can bind States only and exclusively. If treaties contain stipulations with regard to rights and duties of the contracting States' subjects,[1] courts, officials, and the like, these States have to take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like. It may be that according to the Municipal Laws of some countries the official publication of a treaty concluded by the Government is sufficient for this purpose, but in other countries other steps are necessary, such, for example, as special statutes to be passed by the respective Parliaments.[2]

Effect of Changes in Government upon Treaties.

§ 521. As treaties are binding upon the contracting States, changes in the government or even in the form of government of one of the parties can regularly have no influence whatever upon the binding force of treaties. Thus, for instance, a treaty of alliance concluded by a State with constitutional government remains valid, although the Ministry may change. And no head of a State can shirk the obligations of a treaty concluded by his State under the government of his predecessor. Even when a monarchy turns into a republic, or *vice versa*, treaty obligations regularly remain the same. For all such changes and alterations, important as they may be, do not alter the person of the State which concluded the treaty. If, however, a treaty stipulation essentially presupposes a certain form of government, then a change in such form makes such stipulation void, because its execution has become impossible.[3]

[1] See above, § 289.

[2] The distinction between International and Municipal Law as discussed above (§§ 20–25) is the basis from which the question must be decided whether international treaties have a direct effect upon the officials and subjects of the contracting parties.

[3] See below, § 542.

Effect of Treaties upon third States.

§ 522. As a rule, a treaty concerns the contracting States only; neither rights nor duties regularly arise out of a treaty for third States which are not parties to the treaty. But sometimes treaties have indeed an effect upon third States. Such an effect is always produced when a treaty touches previous treaty rights of third States. Thus, for instance, a commercial treaty conceding more favourable conditions than hitherto have been conceded by the parties thereto has an effect upon all such third States as have previously concluded commercial treaties containing the so-called *most-favoured-nation clause* with one of the contracting parties.

The question arises whether in exceptional cases third States can acquire rights out of such treaties as were specially concluded for the purpose of creating such rights not only for the contracting parties but also for third States. Thus, the Hay-Pauncefote Treaty between Great Britain and the United States of 1901 stipulates that the Panama Canal to be built shall be open to vessels of commerce and of war of all nations, although Great Britain and the United States only are parties. Again, article 5 of the Boundary Treaty of Buenos Ayres of September 15, 1881, stipulates that the Straits of Magellan shall be open to vessels of all nations, although Argentina and Chili only are parties. I believe that the question must be answered in the negative, and nothing prevents the contracting parties from altering such a treaty without the consent of third States, provided the latter have not in the meantime acquired such rights through the unanimous tacit consent of all concerned.

VII

Means of securing Performance of Treaties

Vattel, II. §§ 235-261—Hall, § 115—Lawrence, § 154—Phillimore, II. §§ 54-63 A—Bluntschli, §§ 425-441—Heffter, §§ 96-99—Geffcken in Holtzendorff, III. pp. 85-90—Ullmann, § 71—Bonfils, Nos. 838-844—Despagnet, Nos. 460-461—Pradier-Fodéré, II. Nos. 1156-1169—Rivier, II. pp. 94-97—Calvo, III. §§ 1638-1642—Fiore, II. Nos. 1018-1019—Martens, I. § 115—Nippold, l. c. pp. 212-227.

What means have been in use.

§ 523. As there is no international institution which could enforce the performance of treaties, and as history teaches that treaties have frequently been broken, various means of securing performance of treaties have been made use of. The more important of these means are oaths, hostages, pledges, occupation of territory, guarantee. Nowadays these means, which are for the most part obsolete, have no longer great importance on account of the gratifying fact that all the States are now much more conscientious and faithful as regards their treaty obligations than in former times.

Oaths.

§ 524. Oaths are a very old means of securing the performance of treaties, which was constantly made use of not only in antiquity and the Middle Ages, but also in modern times. For in the sixteenth and seventeenth centuries all important treaties were still secured through oaths. During the eighteenth century the custom of securing treaties through oaths gradually died out, the last example being the treaty o alliance between France and Switzerland in 1777, which was solemnly confirmed by the oaths of both parties in the Cathedral at Solothurn. The employment of oaths for securing treaties was of great value in the times of absolutism, when little difference used to be made between the State and its monarch. The more the

distinction grew into existence between the State as the subject of International Law on the one hand, and the monarch as the temporary chief organ of the State on the other hand, the more such oaths fell into disuse. For an oath can exercise its force on the individual only who takes it, and not on the State for which it is taken.

Hostages.

§ 525. Hostages are as old a means of securing treaties as oaths, but they have likewise, for ordinary purposes[1] at least, become obsolete, because they have practically no value at all. The last case of a treaty secured through hostages is the Peace of Aix-la-Chapelle of 1748, in which hostages were stipulated to be sent by England to France for the purpose of securing the restitution of Cape Breton Island to the latter. The hostages sent were Lords Sussex and Cathcart, who remained in France till July 1749.

Pledge.

§ 526. The pledging of movable property by one of the contracting parties to the other for the purpose of securing the performance of a treaty is possible, but has not frequently occurred. Thus, Poland is said to have pledged her crown jewels once to Prussia.[2] The pledging of movables is nowadays quite obsolete, although it might on occasion be revived.

Occupation of Territory.

§ 527. Occupation of territory, such as a fort or even a whole province, as a means of securing the performance of a treaty, has frequently been made use of with regard to the payment of large sums of money due to a State out of a treaty. Nowadays such occupation is only resorted to in connection with treaties of peace stipulating the payment of a war indemnity. Thus, the preliminary peace treaty of

[1] Concerning hostages nowadays taken in time of war, see below, vol. II. §§ 258–259.

[2] See Phillimore, II. § 55.

Versailles in 1871 stipulated that Germany should have the right to keep certain parts of France under military occupation until the final payment of the war indemnity of five milliards of francs.

Guarantee.

§ 528. The best means of securing treaties, and one which is still in use generally, is the guarantee of such other States as are not directly affected by the treaty. Such guarantee is a kind of accession[1] to the guaranteed treaty, and a treaty in itself—namely, the promise of the guarantor eventually to do what is in his power to compel the contracting party or parties to execute the treaty.[2] Guarantee of a treaty is a species only of guarantee in general, which will be discussed below, §§ 574–576.

VIII

Participation of Third States in Treaties

Hall, § 114—Wheaton, § 288—Hartmann, § 51—Heffter, § 88—Bonfils, Nos. 832–834—Despagnet, No. 457—Pradier-Fodéré, II. Nos. 1127–1150—Rivier, II. pp. 89–93—Calvo, III. §§ 1621–1626—Fiore, II. Nos. 1025–1031—Martens, I. § 111.

Interest and Participation to be distinguished.

§ 529. Ordinarily a treaty creates rights and duties between the contracting parties exclusively. Nevertheless, third States may be interested in such treaties, for the common interests of the members of the Family of Nations are so interlaced that few treaties between single members can be concluded in which third States have not some kind of interest. But such

[1] See below, § 532.

[2] Nippold (p. 266) proposes that a universal treaty of guarantee should be concluded between all the members of the Family of Nations guaranteeing for the present and the future all international treaties. I do not believe that this well-meant proposal is feasible.

interest, all-important as it may be, must not be confounded with participation of third States in treaties. Such participation can occur in five different forms—namely, good offices, mediation, intervention, accession, and adhesion.[1]

Good Offices and Mediation.

§ 530. A treaty may be concluded with the help of the good offices or through the mediation of a third State, whether these offices be asked for by the contracting parties or be exercised spontaneously by a third State. Such third State, however, does not necessarily, either through good offices or through mediation, become a real party to the treaty, although this might be the case. A great many of the most important treaties owe their existence to the good offices or mediation of third Powers. The difference between good offices and mediation will be discussed below, vol. II. § 9.

Intervention.

§ 531. A third State may in such a way participate in a treaty that it interposes dictatorially between two States negotiating a treaty and requests them to drop or to insert certain stipulations. Such intervention does not necessarily make the interfering State a real party to the treaty. Instances of such intervention are the protest on the part of Great Britain against the preliminary peace treaty concluded in 1878 at San Stefano[2] between Russia and Turkey, and that on the part of Russia, Germany, and France in 1895 against the peace treaty of Shimonoseki[3] between Japan and China.

[1] That certain treaties concluded by the suzerain are *ipso facto* concluded for the vassal State does not make the latter participate in such treaties. Nor is it correct to speak of participation of a third State in a treaty when a State becomes party to a treaty through the fact that it has given a mandate to another State to contract on its behalf.

[2] See above p. 184.

[3] See R.G. II. pp. 457-463. Details concerning intervention have been given above, § 134-138; see also below, vol. II. § 50.

Accession.

§ 532. Of accession there are two kinds. Accession is termed, first, the formal entrance of a third State into an existing treaty so that such State becomes a party to the treaty with all rights and duties arising therefrom. Such accession can take place only with the consent of the original contracting parties, and accession always constitutes a treaty of itself. Very often the contracting parties stipulate expressly that the treaty shall be open to the accession of a certain State. And the so-called law-making treaties, as the Declaration of Paris or the Geneva Convention for example, regularly stipulate the option of accession of all such States as have not been originally contracting parties.

But there is, secondly, another kind of accession possible. For a State may enter into a treaty between other States for the purpose of guarantee.[1] This kind of accession makes the acceding State a party to the treaty too; but the rights and duties of the acceding State are different from the rights and duties of the other parties, for the former is a guarantor only, whereas the latter are directly affected by the treaty.

Adhesion.

§ 533. Adhesion is termed such entrance of a third State into an existing treaty as takes place either with regard only to a part of the stipulations or with regard only to certain principles laid down in the treaty. Whereas through accession a third State becomes a party to the treaty with all the rights and duties arising from it, through adhesion a third State becomes a party only to such parts or principles of the treaty as it has adhered to. But it must be emphasised that the distinction between accession and adhesion is one made in theory, to which practice

[1] See above, § 528.

does not always correspond. Often treaties speak of accession of third States where in fact adhesion only is meant, and *vice versa*. Thus, article 4 of the Hague Convention with respect to the laws and customs of war on land stipulates the possibility of future *adhesion* of non-signatory Powers, although accession is meant.

IX

Expiration and Dissolution of Treaties

Vattel, II. §§ 198–205—Hall, § 116—Westlake, I. pp. 284–286—Lawrence, § 154—Halleck, I. pp. 293–296—Taylor, §§ 394–399—Wharton, II. § 137 A—Wheaton, § 275—Bluntschli, §§ 450–461—Heffter, § 99—Ullmann, § 73—Bonfils, Nos. 855–860—Despagnet, Nos. 462–465—Pradier-Fodéré, II. Nos. 1200–1218—Rivier, II. § 55—Calvo, III. §§ 1662–1668—Fiore, II. Nos. 1047–1052—Martens, I. § 117—Jellinek, "Die rechtliche Natur der Staatenverträge," pp. 62–64—Nippold, l. c. pp. 235–248—Olivi, "Sull' estinzione dei trattati internazionali" (1883).

Expiration and Dissolution in Contradistinction to Fulfilment.

§ 534. The binding force of treaties may terminate in four different ways, because a treaty may either expire, or be dissolved, or become void, or be cancelled.[1] The grounds of expiration of treaties are, first, expiration of the time for which a treaty was concluded, and, secondly, occurrence of a resolutive condition. Of grounds of dissolution of treaties there are three—namely, mutual consent, withdrawal by notice, and vital change of circumstances. In contradistinction to expiration and dissolution as well as to voidance and cancellation,

[1] The distinction made in the text between fulfilment, expiration, dissolution, voidance, and cancellation of treaties is, as far as I know, nowhere sharply drawn, although it would seem to be of considerable importance. Voidance and cancellation will be discussed below, §§ 540–544 and 545–549.

fulfilment of treaties does not terminate their binding force. A treaty whose obligation has been fulfilled is as valid as before, although it is now of historical interest only.

Expiration through Expiration of Time.

§ 535. All such treaties as are concluded for a certain period of time only, expire with the expiration of such time, unless they are renewed or prolonged for another period. Such time-expiring treaties are frequently concluded, and no notice is necessary for their expirations, except when specially stipulated.

A treaty, however, may be concluded for a certain period of time only, but with the additional stipulation that the treaty shall after the lapse of such period be valid for another such period, unless one of the contracting parties gives notice in due time.

Expiration through Resolutive Condition.

§ 536. Different from time-expiring treaties are such as are concluded under a resolutive condition, which means under the condition that they shall at once expire with the occurrence of certain circumstances. As soon as these circumstances arise, the treaties expire.

Mutual Consent.

§ 537. A treaty, although concluded for ever or for a period of time which has not yet expired, may nevertheless always be dissolved by mutual consent of the contracting parties. Such mutual consent can become apparent in three different ways.

First, the parties can expressly and purposely declare that a treaty shall be dissolved. Or, secondly, they can conclude a new treaty concerning the same objects as those of a former treaty without any reference to the latter, although the two treaties are inconsistent with each other; in such a case it is obvious that the treaty previously concluded was dissolved by tacit mutual consent. Or, thirdly, if the treaty is such as imposes obligations upon one

of the contracting parties only, the other party can renounce its rights. Dissolution by renunciation is a case of dissolution by mutual consent, since acceptance of the renunciation is necessary.

Withdrawal by Notice.

§ 538. Treaties, provided they are not such as are concluded for ever, may also be dissolved by withdrawal, after notice by one of the parties. Many treaties stipulate expressly the possibility of such withdrawal, and as a rule contain details in regard to form and period in which notice is to be given for the purpose of withdrawal. But there are other treaties which, although they do not expressly stipulate the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties. To that class belong all such treaties as are either not expressly concluded for ever or apparently not intended to set up an everlasting condition of things. Thus, for instance, a commercial treaty or a treaty of alliance not concluded for a fixed period only can always be dissolved after notice, although not expressly stipulated. Treaties, however, which are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things, and, further, treaties concluded for a certain period of time only, are regularly not notifiable, although they can be dissolved by mutual consent of the contracting parties.

It must be emphasised that all treaties of peace and all boundary treaties belong to this class. It cannot be denied that history records innumerable cases in which treaties of peace have not established an everlasting condition of things, since one or both of the contracting States took up arms again as soon as they recovered from the exhausting effect of the previous war. But this

does not prove either that such treaties can be dissolved through giving notice, or that they are, as far as International Law at least is concerned, not intended to create an everlasting condition of things.

Vital Change of Circumstances.

§ 539. Although, as just stated, treaties concluded for a certain period of time, and such treaties as are apparently intended or expressly contracted for the purpose of setting up an everlasting condition of things, cannot in principle be dissolved by withdrawal of one of the parties, there is an exception to this rule. For it is an almost universally recognised fact that vital changes of circumstances may be of such a kind as to justify a party in notifying an unnotifiable treaty. The vast majority of publicists, as well as all the Governments of the members of the Family of Nations, agree that all treaties are concluded under the tacit condition *rebus sic stantibus*. That this condition involves a certain amount of danger cannot be denied, for it can be, and indeed frequently has been, abused for the purpose of hiding the violation of treaties behind the shield of law, and of covering shameful wrong with the mantle of righteousness. But all this cannot alter the fact that this exceptional condition is as necessary for International Law and international intercourse as the very rule *pacta sunt servanda*. When, for example, the existence or the necessary development of a State stands in an unavoidable conflict with such State's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and the necessary requirements of the nation are the primary duties of every State. No State would consent to any such treaty as would hinder it in the fulfilment of these primary duties. The consent of a

State to a treaty presupposes a conviction that such treaty is not fraught with danger to its existence and development, and implies a condition that, if by an unforeseen change of circumstances the obligations stipulated in the treaty should imperil the said State's existence and necessary development, the treaty, although by its nature unnotifiable, should nevertheless be notifiable.

The danger of the clause *rebus sic stantibus* is to be found in the elastic meaning of the term "vital changes of circumstances," as, after all, a State must in every special case judge for itself whether there is or is not a vital change of circumstances justifying its withdrawal from an unnotifiable treaty. On the other hand, the danger is counterbalanced by the fact that the frequent and unjustifiable use of the clause *rebus sic stantibus* by a State would certainly destroy all its credit among the nations.

Be that as it may, it is generally agreed that every change of circumstances by no means justifies a State in making use of the clause. All agree that, although treaty obligations may through a change of circumstances become disagreeable, burdensome, and onerous, they must nevertheless be discharged. All agree, further, that a change of government and even a change in the form of a State, such as the turning of a monarchy into a republic and *vice versa*, does not alone and in itself justify a State in notifying such a treaty as is by its nature unnotifiable. On the other hand, all agree in regard to many cases in which the clause *rebus sic stantibus* could justly be made use of. Thus, for example, if a State enters into a treaty of alliance for a certain period of time, and if before the expiration of the alliance a change of circumstances occurs, so that now

the alliance endangers the very existence of one of the contracting parties, all will agree that the clause *rebus sic stantibus* would justify such party in notifying the treaty of alliance.

A certain amount of disagreement as to the cases in which the clause might or might not be justly applied will of course always remain. But the fact is remarkable that during the nineteenth century not many cases of the application of the clause have occurred. And the States and public opinion everywhere have come to the conviction that the clause *rebus sic stantibus* ought not to give the right to a State to liberate itself from the obligations of a treaty, but only the claim to be released from these obligations by the other parties to the treaty. When, in 1870, during the Franco-German War, Russia declared her withdrawal from such stipulations of the Treaty of Paris of 1856 as concerned the neutralisation of the Black Sea and the restriction imposed upon Russia in regard to men-of-war in that sea, Great Britain protested, and a conference was held in London in 1871. Although by a treaty signed on March 13, 1871, this conference, consisting of the signatory Powers of the Treaty of Paris—namely, Austria, England, France, Germany, Italy, Russia, and Turkey—complied with the wishes of Russia and abolished the neutralisation of the Black Sea, it adopted in a protocol[1] of January 17, 1871, the following declaration :—" Que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des parties contractantes, au moyen d'une entente amicale."

[1] See Martens, N.R.G. XVIII. p. 278.

In spite of this declaration, signed also by herself, Russia in 1886 notified her withdrawal from article 59 of the Treaty of Berlin of 1878 stipulating the freedom of the port of Batoum.[1] The signatory Powers of the Treaty of Berlin seem to have tacitly consented, with the exception of Great Britain, which protested. Thus the standard value of the declaration of the Conference of London of 1871 has become doubtful again.

X

Voidance of Treaties

See the literature quoted at the commencement of § 534.

Grounds of Voidance.

§ 540. A treaty, although it has neither expired nor been dissolved, may nevertheless lose its binding force by becoming void.[2] And such voidance may have different grounds—namely, extinction of one of the two contracting parties, impossibility of execution, realisation of the purpose of the treaty otherwise than by fulfilment, and, lastly, extinction of such object as was concerned in a treaty.

Extinction of one of the two Contracting Parties.

§ 541. All treaties concluded between two States become void through the extinction of one of the contracting parties, provided they do not devolve upon such State as succeeds to the extinct State. That some treaties devolve upon the successor has been shown above (§ 82), but many treaties do not. On this ground all political treaties, such as treaties of alliance, guarantee, neutrality, and the like, become void.

[1] See Martens, N.R.G. 2nd ser. XIV. p. 170.

[2] But such voidance must not be confounded with the voidance of a treaty from its very beginning. (See above, § 501.)

Impossibility of Execution.

§ 542. All treaties whose execution becomes impossible subsequently to their conclusion are thereby rendered void. A frequently quoted example is that of three States concluding a treaty of alliance and subsequent war breaking out between two of the contracting parties. In such case it is impossible for the third party to execute the treaty, and it becomes void.[1] It must, however, be added that the impossibility of execution may be temporary only, and that then the treaty is not void but suspended only.

Realisation of Purpose of Treaty other than by Fulfilment.

§ 543. All treaties whose purpose is realised otherwise than by fulfilment become void. For example, a treaty concluded by two States for the purpose of inducing a third State to undertake a certain obligation becomes void if the third State voluntarily undertakes the same obligation before the two contracting States have had an opportunity of approaching the third State with regard to the matter.

Extinction of such Object as was concerned in a Treaty.

§ 544. All treaties whose obligations concern a certain object become void through the extinction of such object. Treaties, for example, concluded in regard to a certain island become void when such island disappears through the operation of nature, as likewise do treaties concerning a third State when such State merges in another.

[1] See also above, § 521, where the case is mentioned that a treaty essentially presupposes a certain form of government, and for this reason cannot be executed when this form of government undergoes a change.

XI

Cancellation of Treaties

See the literature quoted at the commencement of § 534.

Grounds of Cancellation.

§ 545. A treaty, although it has neither expired, nor been dissolved, nor become void, may nevertheless lose its binding force by cancellation. Causes of cancellation are fourfold—namely, inconsistency with International Law created subsequently to the conclusion of the treaty, violation by one of the contracting parties, subsequent change of status of one of them, and war.

Inconsistency with subsequent International Law.

§ 546. Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through a progressive development of International Law they become inconsistent with the latter. Through the abolition of privateering among the signatory Powers of the Declaration of Paris of 1856, for example, all treaties between some of these Powers based on privateering as a recognised institution of International Law were *ipso facto* cancelled. But it must be emphasised that subsequent Municipal Law can certainly have no such influence upon existing treaties. On occasions, indeed, subsequent Municipal Law creates for a State a conflict between its treaty obligations and such law. In such case this State must endeavour to obtain a release by the other contracting party from these obligations.

Violation by one of the Contracting Parties.

§ 547. Violation of a treaty by one of the contracting States does not *ipso facto* cancel such treaty, but it is in the discretion of the other party to cancel it on the ground of violation. There is no unanimity among writers on International Law in regard to

this point, in so far as a minority makes a distinction between essential and non-essential stipulations of the treaty, and maintains that violation of essential stipulations only creates a right for the other party to cancel the treaty. But the majority of writers rightly oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential stipulations, that the binding force of a treaty protects non-essential stipulations as well as essential ones, and that it is for the faithful party to consider for itself whether violation of a treaty, even in its least essential parts, justifies the cancelling of the treaty. The case, however, is different when a treaty expressly stipulates that it should not be considered broken by violation of merely one or another part of it. And it must be emphasised that the right to cancel the treaty on the ground of its violation must be exercised in due time after the violation has become known. If the Power possessing such right does not exercise it in due time, it must be taken for granted that such right has been waived. A mere protest, such as the protest of England in 1886 when Russia withdrew from article 59 of the Treaty of Berlin of 1878, stipulating the freedom of the port of Batoum, neither constitutes a cancellation nor reserves the right of cancellation.

Subsequent Change of Status of one of the Contracting Parties.

§ 548. A cause which *ipso facto* cancels treaties is such subsequent change of status of one of the contracting States as transforms it into a dependency of another State. As everything depends upon the merits of each case, no general rule can be laid down as regards the question when such change of status must be considered to have taken place, and, further, as regards the other question as to the kind

of treaties cancelled by such change. Thus, for example, when a State becomes a member of a Federal State, it is obvious that all its treaties of alliance are *ipso facto* cancelled, for in a Federal State the power of making war rests with the Federal State, and not with the single members. And the same is valid as regards a hitherto full-Sovereign State which comes under the suzerainty of another State. On the other hand, a good many treaties retain their binding force in spite of such a change in the status of a State, all such treaties, namely, as concern matters in regard to which the State has not lost its sovereignty through the change. For instance, if the constitution of a Federal State stipulates that the matter of extradition remains fully in the competence of the member-States, all treaties of extradition of members concluded with third States previous to their becoming members of the Federal State retain their binding force.

War.

§ 549. How far war is a general ground of cancellation of treaties is not quite settled. Details on this point will be given below, vol. II. § 99.

XII

Renewal, Reconfirmation, and Redintegration of Treaties

Vattel, II. § 199—Hall, § 117—Taylor, § 400—Hartmann, § 51—Ullmann, § 73—Bonfils, Nos. 851-854—Pradier-Fodéré, II. Nos. 1191-1199—Rivier, II. pp. 143-146—Calvo, III. §§ 1637, 1666, 1669—Fiore, II. Nos. 1048-1049.

Renewal of Treaties.

§ 550. Renewal of treaties is the term for the prolongation of such treaties before their expiration as were concluded for a definite period of time only. Renewal

can take place through a new treaty, and the old treaty may then as a body or in parts only be renewed. But the renewal can also take place automatically, many treaties concluded for a certain period stipulating expressly that they are considered renewed for another period in case neither of the contracting parties has given notice.

Reconfirmation.

§ 551. Reconfirmation is the term for the express statement made in a new treaty that a certain previous treaty, whose validity has or might have become doubtful, is still, and remains, valid. Reconfirmation takes place after such changes of circumstances as might be considered to interfere with the validity of a treaty; for instance, after a war as regards such treaties as have not been cancelled by the outbreak of war. Reconfirmation can be given to the whole of a previous treaty or to parts of it only. Sometimes reconfirmation is given in this very precise way, that a new treaty stipulates that a previous treaty shall be incorporated in itself. It must be emphasised that in such a case those parties to the new treaty which have not been parties to the previous treaty do not now become so by its reconfirmation, the latter applying to the previous contracting parties only.

Redintegration.

§ 552. Treaties which have lost their binding force through expiration or cancellation may regain it through redintegration. A treaty becomes redintegrated by the mutual consent of the contracting parties regularly given in a new treaty. Thus it is usual for treaties of peace to redintegrate all those treaties cancelled through the outbreak of war whose stipulations the contracting parties do not want to alter.

Without doubt, redintegration does not necessarily take place by a treaty, as theoretically it must be

considered possible for the contracting parties to tacitly redintegrate an expired or cancelled treaty by a line of conduct which indicates apparently their intention to redintegrate the treaty. However, I do not know of any instance of such tacit redintegration.

XIII

Interpretation of Treaties

Grotius, II. c. 16—Vattel, II. § 322—Hall, §§ 111–112—Phillimore, II. §§ 64–95—Halleck, I. pp. 296–304—Taylor, §§ 373–393—Walker, § 31—Wheaton, § 287—Heffter, § 95—Ullmann, § 72—Bonfils, Nos. 835–837—Pradier-Fodéré, II. Nos. 1171–1189—Rivier, II. pp. 122–125—Calvo, III. §§ 1649–1660—Fiore, II. Nos. 1032–1046—Martens, I. § 116—Westlake, I. pp. 282–283.

Authentic Interpretation, and the Compromise Clause.

§ 553. Neither customary nor conventional rules of International Law exist concerning interpretation of treaties. Grotius and the later authorities applied the rules of Roman Law respecting interpretation in general to interpretation of treaties. On the whole, such application is correct in so far as those rules of Roman Law are full of common sense. But it must be emphasised that interpretation of treaties is in the first instance a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree that an interpretation based on scientific grounds can ask a hearing. And these scientific grounds can be no other than those provided by jurisprudence. The best means of settling questions of interpretation, provided the parties cannot come to terms, is arbitration, as the appointed arbitrators will apply the general rules of jurisprudence. Now in regard to interpretation given by the parties them-

selves, there are two different ways open to them. They may either agree informally upon the interpretation and execute the treaty accordingly. Or they may make an additional new treaty and stipulate therein such interpretation of the previous treaty as they choose. In the latter case one speaks of "authentic" interpretation in analogy with the authentic interpretation of Municipal Law given expressly by a statute. Nowadays treaties very often contain the so-called "compromise clause" as regards interpretation—namely, the clause that, in case the parties should not agree on questions of interpretation, these questions shall be settled by arbitration. Italy and Switzerland regularly endeavour to insert that clause in their treaties.

Rules of Interpretation which recommend themselves.

§ 554. It is of importance to enumerate some rules of interpretation which recommend themselves, because everybody agrees upon their suitability.

(1) All treaties must be interpreted according to their reasonable in contradistinction to their literal sense. An excellent example illustrating this rule is the following, which is quoted by several writers:— In the interest of Great Britain the Treaty of Peace of Utrecht of 1713 stipulated in its article 9 that the port and the fortification of Dunkirk should be destroyed and never be rebuilt. France complied with this stipulation, but at the same time began building an even larger port at Mardyck, a league off Dunkirk. Great Britain protested on the ground that France in so acting was violating the reasonable, although not the literal, sense of the Peace of Utrecht, and France recognised in the end this interpretation and discontinued the building of the new port.

(2) The terms used in a treaty must be interpreted according to their usual meaning in the language of

every-day life, provided they are not expressly used in a certain technical meaning or another meaning is not apparent from the context.

(3) It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the treaty, and something not inconsistent with generally recognised principles of International Law and with previous treaty obligations towards third States. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with general recognised principles of International Law and with previous treaty obligations towards third States.

(4) The principle *in dubio mitius* must be applied in interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, the meaning is to be preferred which is less onerous for the obliged party, or which interferes less with the parties' territorial and personal supremacy, or which contains less general restrictions upon the parties.

(5) Previous treaties between the same parties, and treaties between one of the parties and third parties, may be alluded to for the purpose of clearing up the meaning of a stipulation.

(6) If there is a discrepancy between the clear meaning of a stipulation, on the one hand, and, on the other, the intentions of one of the parties declared during the negotiations preceding the signing of a treaty, the decision must depend on the merits of the special case. If, for instance, the discrepancy

was produced through a mere clerical error or by some other kind of mistake, it is obvious that an interpretation is necessary in accordance with the real intentions of the contracting parties.[1]

[1] The whole matter of interpretation of treaties is dealt with in an admirable way by Phillimore II. §§ 64–95.

CHAPTER III

IMPORTANT GROUPS OF TREATIES

I

Important Law-making Treaties

Important Law-making Treaties a product of the Nineteenth Century.

§ 555. Although law-making treaties[1] have been concluded since International Law came into existence, it was not until the nineteenth century that such law-making treaties existed as are of world-wide importance. Although at the Congress at Münster and Osnabrück all the then existing European Powers, with the exception of Great Britain, Russia, and Poland, were represented, the Westphalian Peace of 1648, to which France, Sweden, and the States of the German Empire were parties, and which recognised the independence of Switzerland and the Netherlands on the one hand, and, on the other, the practical sovereignty of the then existing 355 States of the German Empire, was not of world-wide importance, in spite of the fact that it contains various law-making stipulations. And the same may be said with regard to all other treaties of peace between 1648 and 1815. The first law-making treaty of world-wide importance was the Final Act of the Vienna Congress, 1815, and the last, as yet, is the Treaty of Washington of 1901. But it must be

[1] Concerning the conception of law-making treaties, see above §§ 18 and 492.

particularly noted that not all of these are *pure* law-making treaties, since many contain other stipulations besides those which are law-making.

Final Act of the Vienna Congress.

§ 556. The Final Act of the Vienna Congress,[1] signed on June 9, 1815, by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden-Norway, comprises law-making stipulations of world-wide importance concerning four points—namely, first, the perpetual neutralisation of Switzerland (article 118, No. 11); secondly, free navigation on so-called international rivers (articles 108–117); thirdly, the abolition of the negro slave trade (article 118, No. 15); fourthly, the different classes of diplomatic envoys (article 118, No. 16).

Protocol of the Congress of Aix-la-Chapelle.

§ 557. The Protocol of November 21 of the Congress of Aix-la-Chapelle,[2] 1818, signed by Great Britain, Austria, France, Prussia, and Russia, contains the important law-making stipulation concerning the establishment of a fourth class of diplomatic envoys, the so-called "Ministers Resident," to rank before the Chargés d'Affaires.

Treaty of London of 1831.

§ 558. The Treaty of London[3] of November 15, 1831, signed by Great Britain, Austria, France, Prussia, and Russia, comprises in its article 7 the important law-making stipulation concerning the perpetual neutralisation of Belgium.

Declaration of Paris.

§ 559. The Declaration of Paris[4] of April 13, 1856, signed by Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, is a pure law-making treaty of the greatest importance, stipulating four

[1] Martens, N.R., p. 379. See Angeberg, Le congrès de Vienne et les traités de 1815 (4 vols., 1863).

[2] Martens, N.R., IV. p. 648. See Angeberg, l. c.

[3] Martens, N.R., XI. p. 390. See Descamps, La neutralité de la Belgique (1902).

[4] Martens, N.R.G., XV. p. 767.

rules with regard to sea warfare—namely, that privateering is abolished; that the neutral flag covers enemy goods with the exception of contraband of war; that neutral goods, contraband excepted, cannot be confiscated even when sailing under the enemy flag; that a blockade must be effective to be binding.

Through accession during 1856, the following other States have become parties to this treaty: Argentina, Belgium, Brazil, Chili, Denmark, Ecuador, Greece, Guatemala, Hayti, Holland, Peru, Portugal, Sweden-Norway, and Switzerland. Japan acceded in 1886.

Geneva Convention.

§ 560. The Geneva Convention[1] of August 22, 1864, signed originally by Switzerland, Baden, Belgium, Denmark, France, Holland, Italy, Prussia, and Spain, is a pure law-making treaty for the amelioration of the condition of the wounded of armies in the field. Apart from the member-States of Germany, the following other States have become parties to the treaty through accession: Great Britain, Argentina, Austria-Hungary, Bolivia, Bulgaria, Chili, Congo Free State, Greece, Guatemala, Honduras, Japan, Korea, Luxemburg, Montenegro, Nicaragua, Persia, Peru, Portugal, Roumania, Russia, Salvador, Servia, Siam, Sweden-Norway, Turkey, United States of America, Uruguay, Venezuela. A treaty containing additional[2] articles to the Geneva Convention was signed at Geneva on October 20, 1868, but was not ratified. The Final Act of the Hague Peace Conference of 1900 contains a convention for the adapta-

[1] Martens, N.R.G., XVIII. p. 607. See Lueder, Die Genfer Convention (1876), and Münzel, Untersuchungen über die Genfer Convention (1901).

[2] Martens, N.R.G., XVIII. p. 612.

tion to sea warfare of the principles of the Geneva Convention.

Treaty of London of 1867.

§ 561. The Treaty of London[1] of May 11, 1867, signed by Great Britain, Austria, Belgium, France, Holland, Italy, Prussia, and Russia, comprises in its article 2 the important law-making stipulation concerning the perpetual neutralisation of Luxemburg.

Declaration of St. Petersburg.

§ 562. The Declaration of St. Petersburg[2] of November 29, 1868, signed by Great Britain, Austria-Hungary, Belgium, Denmark, France, Greece, Holland, Italy, Persia, Portugal, Prussia and other German States, Russia, Sweden-Norway, Switzerland, and Turkey—Brazil acceded later on—is a pure law-making treaty. It stipulates that projectiles of a weight below 400 grammes (14 ounces) which are either explosive or charged with inflammable substances shall not be made use of in war.

Treaty of Berlin of 1878.

§ 563. The Treaty of Berlin[3] of July 13, 1878, signed by Great Britain, Austria-Hungary, France, Germany, Italy, Russia, and Turkey, is law-making with regard to Bulgaria, Montenegro, Roumania, and Servia. It is of great importance in so far as the present phase of the solution of the Near Eastern Question arises therefrom.

General Act of the Congo Conference.

§ 564. The General Act of the Congo Conference[4] of Berlin of February 26, 1885, signed by Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Holland, Italy, Portugal, Russia, Spain, Sweden-Norway, Turkey, and the United States of

[1] Martens, N.R.G., XVIII. 445. See Wampach, Le Luxembourg Neutre (1900).

[2] Martens, N.R.G., XVIII. p. 474.

[3] Martens, N.R.G., 2nd ser. III. p. 449. See Mulas, Il congresso di Berlino (1878).

[4] Martens, N.R.G., 2nd ser. X. p. 414. See Patzig, Die afrikanische Conferenz und der Congostaat (1885).

America, is a law-making treaty of great importance, stipulating: freedom of commerce within the basin of the river Congo for all nations; prohibition of slave-transport within that basin; neutralisation of Congo Territories; freedom of navigation on the rivers Congo and Niger for merchantmen of all nations; and, lastly, the obligation of the signatory Powers to notify to one another all future occupations on the coast of the African continent.

Treaty of Constantinople of 1888.

§ 565. The Treaty of Constantinople[1] of October 29, 1888, signed by Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Russia, Spain, and Turkey, is a pure law-making treaty stipulating the permanent neutralisation of the Suez Canal and the freedom of navigation thereon for vessels of all nations.

General Act of the Brussels Anti-Slavery Conference.

§ 566. The General Act of the Brussels Anti-Slavery Conference,[2] signed on July 2, 1890, by Great Britain, Austria-Hungary, Belgium, the Congo Free State, Denmark, France, Germany, Holland, Italy, Persia, Portugal, Russia, Sweden-Norway, Spain, Turkey, the United States of America, and Zanzibar, is a law-making treaty of great importance which stipulates a system of measures for the suppression of slave-trade in Africa, and, incidentally, restrictive measures concerning the spirit-trade in certain parts of Africa.

Final Act of the Hague Peace Conference.

§ 567. The Final Act of the Hague Peace Conference[3] of July 29, 1899, is a pure law-making treaty of vast importance, and comprises, besides three conven-

[1] Martens, N.R.G., 2nd ser. XV. p. 557. See above, § 183.

[2] Martens, N.R.G., 2nd ser. XVI. p. 3, and XXV. p. 543. See Lentner, Der afrikanische Sklavenhandel und die Brüsseler Conferenzen (1891).

[3] Martens, N.R.G., 2nd ser. XXVI. p. 920. See Holls, The Peace Conference at the Hague (1900), and Mérignhac, La Conférence internationale de la Paix (1900).

tions of minor importance, which are styled "Declarations," three separate conventions—namely, a convention for the peaceful adjustment of international differences, a convention concerning the law of land warfare, and a convention for the adaptation to maritime warfare of the principles of the Geneva Convention. The Powers which took part in the conference are the following: Great Britain, Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Greece, Holland, Italy, Japan, Luxemburg, Mexico, Montenegro, Persia, Portugal, Roumania, Russia, Servia, Siam, Spain, Sweden-Norway, Switzerland, Turkey, and the United States of America. All these Powers are parties to the three conventions, with the following exceptions: Switzerland refused to sign the second convention, and Sweden-Norway, although she signed, refused to ratify it; China and Turkey signed all three conventions, but did not ratify any of them.

Treaty of Washington of 1901.

§ 568. The so-called Hay-Pauncefote Treaty of Washington[1] between Great Britain and the United States of America, signed November 18, 1901, is, although law-making between the parties only, nevertheless of world-wide importance because it neutralises permanently the Panama Canal of the future and stipulates free navigation thereon for vessels of all nations.[2]

[1] See Treaty Series, 1902, No. 6.

[2] It ought to be mentioned that article 5 of the Boundary Treaty of Buenos Ayres, signed by Argentina and Chili on September 15, 1881—see Martens, N.R.G., 2nd ser. XII. p. 491—contains a law-making stipulation of world-wide importance, because it neutralises the Straits of Magellan for ever and declares them open to vessels of all nations. See above, p. 250, note 2, and below, vol. II. § 72.

II

Alliances

Grotius, II. c. 15—Vattel, III. §§ 78-102—Twiss, I. § 246—Taylor, §§ 347-349—Wheaton, §§ 278-285—Bluntschli, §§ 446-449—Heffter, § 92—Geffcken in Holtzendorff, III. pp. 115-139—Liszt, § 37—Bonfils, Nos. 871-881—Pradier-Fodéré, II. Nos. 934-967—Rivier, II. pp. 111-116—Calvo, III. §§ 1587-1588—Fiore, II. No. 1094—Martens, I. § 113—Rolin-Jacquemyns in R.I. XX. (1888), pp. 5-35.

Conception of Alliances.

§ 569. Alliances in the strict sense of the term are treaties of union between two or more States for the purpose of defending each other against an attack in war, or of jointly attacking third States, or for both purposes. The term "alliance" is, however, often made use of in a wider sense, and it comprises in such cases treaties of union for various purposes. Thus, the so-called "Holy Alliance," concluded in 1815 between the Emperors of Austria and Russia and the King of Prussia, which almost all of the Sovereigns of Europe afterwards joined, was a union for such vague purposes that it cannot be called an alliance in the strict sense of the term.

History relates innumerable alliances between the different States. They have always played, and still play, an important part in politics. For the present the triple alliance between Germany, Austria, and Italy since 1879 and 1882, the alliance between Russia and France since 1899, and that between Great Britain and Japan since 1902 are illustrative examples.[1]

[1] The following is the text of the Anglo-Japanese treaty of alliance:—

The Governments of Great Britain and Japan, actuated solely by a desire to maintain the *status quo* and general peace in the extreme East, being moreover specially interested in maintaining the independence and territorial integrity of the Empire of China and the Empire of Corea, and in securing equal opportunities in those countries for the commerce

Parties to Alliances.

§ 570. Subjects of alliances are said to be full-Sovereign States only. But the fact cannot be denied that alliances have been concluded by States under suzerainty. Thus, the convention between

and industry of all nations, hereby agree as follows:—

ARTICLE I.

The High Contracting Parties, having mutually recognised the independence of China and of Corea, declare themselves to be entirely uninfluenced by any aggressive tendencies in either country. Having in view, however, their special interests, of which those of Great Britain relate principally to China, while Japan, in addition to the interests which she possesses in China, is interested in a peculiar degree politically, as well as commercially and industrially, in Corea, the High Contracting Parties recognise that it will be admissible for either of them to take such measures as may be indispensable in order to safeguard those interests if threatened either by the aggressive action of any other Power, or by disturbances arising in China or Corea, and necessitating the intervention of either of the High Contracting Parties for the protection of the lives and property of its subjects.

ARTICLE II.

If either Great Britain or Japan, in the defence of their respective interests as above described, should become involved in war with another Power, the other High Contracting Party will maintain a strict neutrality, and use its efforts to prevent other Powers from joining in hostilities against its ally.

ARTICLE III.

If in the above event any other Power or Powers should join in hostilities against that ally, the other High Contracting Party will come to its assistance and will conduct the war in common, and make peace in mutual agreement with it.

ARTICLE IV.

The High Contracting Parties agree that neither of them will, without consulting the other, enter into separate arrangements with another Power to the prejudice of the interests above described.

ARTICLE V.

Whenever, in the opinion of either Great Britain or Japan, the above-mentioned interests are in jeopardy, the two Governments will communicate with one another fully and frankly.

ARTICLE VI.

The present Agreement shall come into effect immediately after the date of its signature, and remain in force for five years from that date.

In case neither of the High Contracting Parties should have notified twelve months before the expiration of the said five years the intention of terminating it, it shall remain binding until the expiration of one year from the day on which either of the High Contracting Parties shall have denounced it. But if, when the date fixed for its expiration arrives, either ally is actually engaged in war, the alliance shall, *ipso facto*, continue until peace is concluded.

In faith whereof the Undersigned, duly authorised by their respective Governments, have signed this Agreement, and have affixed thereto their seals.

Done in duplicate at London, the 30th January, 1902.

Roumania, which was then under Turkish suzerainty, and Russia of April 16, 1877, concerning the passage of Russian troops through Roumanian territory in case of war with Turkey, was practically a treaty of alliance.[1] Thus, further, the former South African Republic, although, according to the views of the British Government at least, a half-Sovereign State under British suzerainty, concluded an alliance with the former Orange Free State by treaty of March 17, 1897.[2]

A neutralised State can be the subject of an alliance for the purpose of defence, whereas the entrance into an offensive alliance on the part of such State would involve a breach of its neutrality.

Different kinds of Alliances.

§ 571. An alliance may be, as already mentioned, offensive or defensive, or both. All three may be either general alliances, in which case the allies are united against any possible enemy whatever, or particular alliances against one or more individual enemies. Alliances may, further, be either permanent or temporary, and in the latter case they expire with the period of time for which they were concluded. As regards offensive alliances, it must be emphasised that they are valid only when their object is not immoral.[3]

Conditions of Alliances.

§ 572. Alliances may contain all sorts of conditions. The most important are the conditions regarding the assistance to be rendered. It may be that assistance is to be rendered with the whole or a limited part of the military and naval forces of the allies, or with the whole or a limited part of their military or with the whole or a limited part of their

[1] See Martens, N.R.G., 2nd ser. XXV. p. 327. III. p. 182.
[2] See Martens, N.R.G., 2nd ser.
[3] See above, § 505.

naval forces only. Assistance may, further, be rendered in money only, so that one of the allies is fighting with his forces while the other supplies a certain sum of money for their maintenance. A treaty of alliance of such a kind must not be confounded with a simple treaty of subsidy. If two States enter into a convention that one of the parties shall furnish the other permanently in time of peace and war with a limited number of troops in return for a certain annual payment, such convention is not an alliance, but a treaty of subsidy only. But if two States enter into a convention that in case of war one of the parties shall furnish the other with a limited number of troops, be it in return for payment or not, such convention really constitutes an alliance. For every convention concluded for the purpose of lending succour in time of war implies an alliance. It is for this reason that the above-mentioned treaty of 1877 (§ 570) between Russia and Roumania concerning the passage of Russian troops through Roumanian territory in case of war against Turkey was really a treaty of alliance.

Casus Fœderis.

§ 573. *Casus fœderis* is the event upon the occurrence of which it becomes the duty of one of the allies to render the promised assistance to the other. Thus in case of a defensive alliance the *casus fœderis* occurs when war is declared or commenced against one of the allies. Treaties of alliance very often define precisely the event which shall be the *casus fœderis*, and then the latter is less exposed to controversy. But, on the other hand, there have been enough alliances concluded without such specialisation, and, consequently, later on disputes have arisen between the parties as to the *casus fœderis*.

III

Treaties of Guarantee and of Protection

Vattel, II. §§ 235–239—Hall, § 113—Phillimore, II. §§ 56–63—Twiss, I. § 249—Halleck, I. p. 285—Taylor, §§ 350–353—Wheaton, § 278—Bluntschli, §§ 430–439—Heffter, § 97—Geffcken in Holtzendorff, III. pp. 85–112—Bonfils, Nos. 882–893—Pradier-Fodéré, II. Nos. 969–1020—Rivier, II. pp. 97–105—Calvo, III. §§ 1584–1585—Martens, I. § 115—Neyron, "Essai historique et politique sur les garanties" (1779)—Milovanovitch, "Des traités de garantie en droit international" (1888).

Conception and Objects of Guarantee Treaties.

§ 574. Treaties of guarantee are conventions by which one of the parties engages to do what is in its power to secure a certain object to the other party. Guarantee treaties may be mutual or unilateral. They may be concluded by two States only, or by a number of States jointly, and in the latter case the single guarantors may give their guarantee severally or collectively or both. And the guarantee may be for a certain period of time only or permanent.

The possible objects of guarantee treaties are numerous.[1] It suffices to give the following chief examples: the performance of a particular act on the part of a certain State, as the discharge of a debt or the cession of a territory; certain rights of a State; the undisturbed possession of the whole or a particular part of the territory; a particular form of Constitution; a certain status, as permanent neutrality (Switzerland, Belgium, Luxemburg) or independence; a particular dynastic succession; fulfilment of a treaty concluded by a third State.[2]

[1] What an important part treaties of guarantee play in politics may be seen from a glance at Great Britain's guarantee treaties. See Munro, England's Treaties of Guarantee, in The Law Magazine and Review, VI. (1880–1881), p. 160.

[2] See above, § 528.

Effect of Treaties of Guarantee.

§ 575. The effect of guarantee treaties is the creation of the duty of the guarantors to do what is in their power to secure the guaranteed objects. The compulsion to be applied by a guarantor for that purpose depends upon the circumstances; it may eventually be war. But the duty of the guarantor to render even by compulsion the promised assistance to the guaranteed depends upon many conditions and circumstances. Thus, first, the guaranteed must request the guarantor to render his assistance. When, for instance, the possession of a certain part of its territory is guaranteed to a State which after its defeat in a war with a third State accepts the condition of peace to cede such piece of territory to the victor without having requested the intervention of the guarantor, the latter has neither a right nor a duty to interfere. Thus, secondly, the guarantor must at the critical time be able to render the required assistance. When, for instance, its hands are tied through waging war against a third State, or when it is so weak through internal troubles or other factors that its interference would expose it to a serious danger, it is not bound to fulfil the request for assistance. So too, when the guaranteed has not complied with previous advice as to the line of its behaviour given by the guarantor, it is not the latter's duty to render assistance afterwards.

It is impossible to state all the circumstances and conditions upon which the fulfilment of the duty of the guarantor depends, as every case must be judged upon its own merits. And it is certain that more frequently than in other cases changes in political constellations and the general developments of events may involve such vital change of circum-

stances as to justify [1] a State in repudiating its interference in spite of a treaty of guarantee. It is for this reason that treaties of guarantee to secure permanently a certain object to a State are naturally of a more or less precarious value for the latter. The practical value, therefore, of a guarantee treaty, whatever may be its formal character, would seem to extend as a rule to the early years only of its existence while the original conditions still obtain.

Effect of Collective Guarantee.

§ 576. In contradistinction to treaties constituting a guarantee on the part of one or more States severally, the effect of treaties constituting a *collective* guarantee on the part of several States requires special consideration. On June 20, 1867, Lord Derby maintained [2] in the House of Lords concerning the collective guarantee of the neutralisation of Luxemburg by the Powers that in case of a collective guarantee each guarantor had only the duty to act according to the treaty when all the other guarantors were ready to act likewise; that, consequently, if one of the guarantors themselves should violate the neutrality of Luxemburg, the duty to act according to the treaty of collective guarantee would not accrue to the other guarantors. This opinion is certainly not correct,[3] and I do not know of any publicist who would or could approve of it. There ought to be no doubt that in a case of collective guarantee one of the guarantors alone cannot be considered bound to act according to the treaty of guarantee. For a collective guarantee can have the meaning only that the guarantors should act in a body. But if one of the guarantors themselves violates the object of his own guarantee, the body of the guarantors remains, and

[1] See above, § 539.
[2] Hansard, vol. 183, p. 150.
[3] See Hall, § 113, and Bluntschli, § 440.

it is certainly their duty to act against such faithless co-guarantor. If, however, the majority, and therefore the body of the guarantors, were to violate the very object of their guarantee, the duty to act against them would not accrue to the minority.

Yet different is the case in which a number of Powers have *collectively and severally* guaranteed a certain object. Then not only as a body but also individually, it is their duty to interfere in any case of violation of the object of guarantee.

Treaties of Protection.

§ 577. Different from guarantee treaties are treaties of protection. Whereas the former constitute the guarantee of a certain object to the guaranteed, treaties of protection are treaties by which strong States simply engage to protect weaker States without any guarantee whatever. A treaty of protection must, however, not be confounded with a treaty of protectorate.[1]

IV

Unions concerning Common Non-Political Interests

Descamps, "Les offices internationaux et leur avenir" (1894)—Moynier, Les Bureaux internationaux des Unions universelles" (1892)—Poinsard, "Les Unions et ententes internationales" (2nd ed. 1901).

Common in Contradistinction to Particular Interests.

§ 578. The development of international intercourse has called into existence innumerable treaties for the purpose of satisfying economic and other non-political interests of the different States. Each nation concludes treaties of commerce, of navigation, of jurisdiction, and of many other kinds with most

[1] See above, § 92.

of the other nations, and tries in this way more or less successfully to foster its own interests. Many of these interests are of so particular a character and depend upon such individual circumstances and conditions that they can only be satisfied and fostered by special treaties from time to time concluded by each State with other States. Yet experience has shown that the different States have also many non-political interests in common which can better be satisfied and fostered by a general treaty between a great number of States than by special treaties singly concluded between the different parties. Such general treaties have, therefore, since the second half of the nineteenth century, more and more come into being, and it is certain that their number will in time increase. The number of States which are parties to these general treaties varies, of course, and whereas some of them will certainly become in time universal international treaties in the same way as the treaty which is the basis of the Universal Postal Union, others will never reach that stage. But all of them are general treaties in so far as a lesser or greater number of States are parties.

Universal Postal Union.

§ 579. Whereas formerly the different States severally concluded treaties concerning postal arrangements, twenty-one States entered on October 9, 1874, at Berne, into a general postal convention[1] for the purpose of creating a General Postal Union. This General turned into the Universal Postal Union through the Convention of Paris[2] of June 1, 1878, to which thirty States were parties. This convention has several times been revised by the congresses of the Union, which have to meet every five years. The

[1] See Martens, N.R.G., 2nd ser. I. p. 651.
[2] See Martens, N.R.G., 2nd ser. III. p. 699.

last revision took place at the Congress of Washington, 1897, where on June 15 a new universal postal convention was signed by fifty States, but by-and-by other States acceded, so that now more than sixty States are members of the Union. This Union possesses an International Office [1] seated at Berne.[2]

Universal Telegraph Union.

§ 580. A general telegraphic convention was already concluded at Paris on May 17, 1865, and in 1868 an International Telegraph Office[3] was instituted at Berne. In time more and more States joined, and the basis of the Union is now the Convention of St. Petersburg[4] of July 28, 1875, which has several times been amended, the last time at Berlin[5] on September 17, 1885. That the Union will one day become universal there is no doubt, but as yet, although called "Universal" Telegraphic Union, only about thirty States are members.

Concerning the general treaty of March 14, 1884, for the protection of submarine telegraph cables,[6] see above, § 287.

Union concerning Railway Transports and Freights.

§ 581. A general convention[7] was concluded on October 14, 1890, at Berne, concerning railway transports and freights. The parties—namely, Austria, Belgium, France, Germany, Holland, Italy, Luxemburg, Russia, and Switzerland—form a Union for this purpose, although the term "Union" is not

[1] See above, § 465.

[2] See Fischer, Post und Telegraphie im Weltverkehr (1879); Schröter, Der Weltpostverein (1900); Rolland, De la correspondance postale et télégraphique dans les relations internationales (1901).

[3] See above, § 464. Fischer, Die Telegraphie und das Völkerrecht (1876).

[4] See Martens, N.R.G., 2nd ser. III. p. 614.

[5] See Martens, N.R.G., 2nd ser. XII. p. 205.

[6] See Martens, N.R.G., 2nd ser XI. p. 281.

[7] See Martens, N.R.G., 2nd ser. XIX. p. 289.

made use of. The Union possesses an International Office[1] at Berne.

Convention concerning the Metric System

§ 582. A general convention[2] was concluded on May 20, 1875, for the purpose of instituting an International Office[3] of Weights and Measures at Paris. The original parties were—Argentina, Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Italy, Peru, Portugal, Russia, Spain, Sweden-Norway, Switzerland, Turkey, the United States of America, and Venezuela. Great Britain, Japan, Mexico, Roumania, and Servia acceded later on.

Union Protection of Industrial Property.

§ 583. On March 20, 1883, the Convention of Paris[4] was signed for the purpose of creating an international union for the Protection of Industrial Property. The original members were: Belgium, Brazil, France, Holland, Guatemala, Italy, Portugal, Salvador, Servia, Spain, and Switzerland. Great Britain, Japan, Ecuador, Mexico, the United States of America, Sweden-Norway, Germany, and Cuba acceded later on. This Union has an International Office[5] at Berne. The object of the Union is the protection of patents, trade-marks, and the like; on April 14, 1891, at Madrid, it agreed to an arrangement concerning the registration of trade-marks.[6]

Union Protection of Works of Literature and Art.

§ 584. On September 9, 1886, the Convention of Berne[7] was signed for the purpose of creating an

[1] See above, § 470. Kaufmann, Die mitteleuropäischen Eisenbahnen und das internationale öffentliche Recht (1893); Rosenthal, Internationales Eisenbahnfrachtrecht (1894); Magne, Des raccordements internationaux de chemins de fer etc. (1901); Eger, Das internationale Uebereinkommen über den Eisenbahnfrachtverkehr (2nd ed. 1903).

[2] See Martens, N.R.G., 2nd ser. I. p. 663.

[3] See above, § 466.

[4] See Martens, N.R.G., 2nd ser. X. p. 133.

[5] See above, § 467.

[6] See Martens, N.R.G., 2nd ser. XXII. p. 208. Pelletier et Vidal-Noguet, La convention d'Union pour la protection de la propriété industrielle du 20 mars 1883 et les conférences de révision postérieures (1902).

[7] See Martens, N.R.G., 2nd ser. XII. p. 173.

international Union for the Protection of Works of Art and Literature. The Union has an International Office[1] at Berne. The original members were: Great Britain, Belgium, France, Germany, Hayti, Italy, Liberia, Spain, Switzerland, and Tunis. Denmark, Japan, Luxemburg, Monaco, and Sweden-Norway acceded later on. An additional Act[2] to the convention was signed at Paris on May 4, 1896. To comply with the convention, Parliament passed in 1886 the "Act[3] to amend the law respecting international and colonial copyright."

Union for the Publication of Customs Tariffs.

§ 585. On July 5, 1890, the Convention of Brussels was signed for the purpose of creating an international Union for the Publication of Customs Tariffs.[4] The Union has an International Office[5] at Brussels, which publishes the customs tariffs of the various States of the globe. The members of the Union are the following States: Great Britain, Argentina, Austria-Hungary, Belgium, Bolivia, Chili, the Congo Free State, Costa Rica, Denmark, France, Greece, Guatemala, Hayti, Holland, Italy, Mexico, Nicaragua, Paraguay, Peru, Portugal, Roumania, Russia, Salvador, Siam, Spain, Switzerland, Turkey, the United States of America, Uruguay, and Venezuela.

Conventions concerning Private International Law.

§ 586. On November 14, 1896, was signed the Convention of the Hague for the purpose of establishing uniform rules concerning several matters of the so-called Private International Law.[6] The original parties were: Belgium, France, Holland, Italy, Luxemburg, Portugal, Spain, and Switzerland. Austria-

[1] See above, § 467. Orelli, Der internationale Schutz des Urheberrechts (1887); Thomas, La convention littéraire et artistique internationale etc. (1894).

[2] See Martens, N.R.G., 2nd ser. XXIV. p. 758.

[3] 49 & 50 Vict. c. 33.

[4] See Martens, N.R.G., 2nd ser. XVIII. p. 558.

[5] See above, § 469.

[6] See Martens, N.R.G., 2nd ser. XXIII. p. 398.

Hungary, Denmark, Germany, Roumania, Sweden-Norway, and Russia acceded later on. The same States, with the exception of Denmark, Russia, and Norway (but not Sweden, which is a party), signed on June 12, 1902, at the Hague, three other conventions [1] for the purpose of regulating conflicts of laws concerning marriage, concerning divorce, and concerning guardianship over infants.

Phylloxera Conventions.

§ 587. Owing to the great damage done to grapes through phylloxera epidemics, a general convention [2] for the prevention of the extension of such epidemics was concluded on September 17, 1878, at Berne. Its place was afterwards taken by the convention [3] signed at Berne on November 3, 1881. The original members were: Austria-Hungary, France, Germany, Italy, Portugal, Spain, and Switzerland. Belgium, Holland, Luxemburg, Roumania, and Servia acceded later on.

Sanitary Conventions.

§ 588. In the interest of international public health, two general treaties have been concluded concerning the cholera, and one concerning the plague. The two Cholera Conventions were signed at Dresden on April 15, 1893, and at Paris on April 3, 1894; an additional Declaration was signed at Paris on October 30, 1899.[4] The Plague Convention was signed at Venice on March 19, 1897, and an additional Declaration on January 24, 1900, at Rome.[5]

Monetary Unions.

§ 589. On December 23, 1865, Belgium, France,

[1] See Martens, N.R.G., 2nd ser. XXXI. pp. 26 and 706.

[2] See Martens, N.R.G., 2nd ser. VI. p. 261.

[3] See Martens, N.R.G., 2nd ser. VIII. p. 435.

[4] See Martens, N.R.G., 2nd ser. XIX. p. 239, and XXIV. p. 517.

[5] See Martens, N.R.G., 2nd ser. XXVIII. p. 339, and XXIX. p. 495. Attention should be drawn to a very valuable suggestion made by Ullmann in R.I. XI. (1879), p. 527, and in R.G. IV. (1897), p. 437. Bearing in mind the fact that frequently in time of war epidemics break out in consequence of insufficient disinfection of the battlefields, Ullmann suggests a general convention instituting neutral sanitary commissions whose duty would be to take all necessary sanitary measures after a battle.

Italy, and Switzerland signed the Convention of Paris which created the so-called "Latin Monetary Union" between the parties; Greece acceded in 1868.[1] This convention was three times renewed and amended—namely, in 1878, 1885, and 1893.[2]

Another Monetary Union is that entered into by Denmark, Sweden, and Norway by the Convention of Copenhagen[3] of May 27, 1873.

On November 22, 1892, the International Monetary Conference[4] met at Brussels, where the following States were represented: Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Greece, Holland, Italy, Mexico, Portugal, Roumania, Spain, Sweden-Norway, Switzerland, Turkey, and the United States of America. The deliberations of this conference had, however, no practical result.

Convention for Preservation of Wild Animals in Africa.

§ 590. In behalf of the preservation of wild animals, birds, and fish in Africa, the Convention of London[5] was signed on May 19, 1900, by Great Britain, the Congo Free State, France, Germany, Italy, Portugal, and Spain.

Convention concerning Bounties on Sugar.

§ 591. On March 5, 1902, the Convention of Brussels[6] was signed concerning the abolition of bounties on the production and exportation of sugar. The original parties were: Great Britain, Austria-Hungary, Belgium, France, Germany, Holland, Italy, Spain, and Sweden-Norway. Luxemburg, Peru, and Russia acceded later on. A Permanent Commission[7] was established at Brussels for the purpose of supervising the execution of the convention.

[1] See Martens, N.R.G., XX. pp. 688 and 694.
[2] See Martens, N.R.G., 2nd ser. IV. p. 725, XI. p. 65, XXI. p. 285.
[3] See Martens, N.R.G., 2nd ser. I. p. 290.
[4] See Martens, N.R.G., 2nd ser. XXIV. pp. 167–478.
[5] See Martens, N.R.G., 2nd ser. XXX. p. 430.
[6] See Martens, N.R.G., 2nd ser. XXXI. p. 272.
[7] See above, §§ 462 and 471.

APPENDIX

THE ANGLO-FRENCH AGREEMENT OF APRIL 8, 1904

I

DECLARATION RESPECTING EGYPT AND MOROCCO

Article I

His Britannic Majesty's Government declare that they have no intention of altering the political status of Egypt.

The Government of the French Republic, for their part declare that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British occupation or in any other manner, and that they give their assent to the draft Khedivial Decree annexed[1] to the present Arrangement, containing the guarantees considered necessary for the protection of the interests of the Egyptian bondholders, on the condition that, after its promulgation, it cannot be modified in any way without the consent of the Powers Signatory of the Convention of London of 1885.

It is agreed that the post of Director-General of Antiquities in Egypt shall continue, as in the past, to be entrusted to a French *savant*.

The French schools in Egypt shall continue to enjoy the same liberty as in the past.

Article II

The Government of the French Republic declare that they have no intention of altering the political status of Morocco.

His Britannic Majesty's Government, for their part, recognise that it appertains to France, more particularly as a Power whose dominions are conterminous for a great distance with those of Morocco, to preserve order in that country, and to provide assistance for the purpose of all administrative, economic, financial, and military reforms which it may require.

[1] Not printed in this Appendix.

They declare that they will not obstruct the action taken by France for this purpose, provided that such action shall leave intact the rights which Great Britain, in virtue of Treaties, Conventions, and usage, enjoys in Morocco, including the right of coasting trade between the ports of Morocco enjoyed by British vessels since 1901.

Article III

His Britannic Majesty's Government, for their part, will respect the rights which France, in virtue of Treaties, Conventions, and usage, enjoys in Egypt, including the right of coasting trade between Egyptian ports accorded to French vessels.

Article IV

The two Governments, being equally attached to the principle of commercial liberty both in Egypt and Morocco, declare that they will not, in those countries, countenance any inequality either in the imposition of customs duties or other taxes, or of railway transport charges.

The trade of both nations with Morocco and with Egypt shall enjoy the same treatment in transit through the French and British possessions in Africa. An Agreement between the two Governments shall settle the conditions of such transit and shall determine the points of entry.

This mutual engagement shall be binding for a period of thirty years. Unless this stipulation is expressly denounced at least one year in advance, the period shall be extended for five years at a time.

Nevertheless, the Government of the French Republic reserve to themselves in Morocco, and His Britannic Majesty's Government reserve to themselves in Egypt, the right to see that the concessions for roads, railways, ports, &c., are only granted on such conditions as will maintain intact the authority of the State over these great undertakings of public interest.

Article V

His Britannic Majesty's Government declare that they will use their influence in order that the French officials now in the Egyptian service may not be placed under conditions less advantageous than those applying to the British officials in the same service.

The Government of the French Republic, for their part,

would make no objection to the application of analogous conditions to British officials now in the Moorish service.

Article VI

In order to insure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of Article VIII. of that Treaty will remain in abeyance.

Article VII

In order to secure the free passage of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou.

This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean.

Article VIII

The two Governments, inspired by their feeling of sincere friendship for Spain, take into special consideration the interests which that country derives from her geographical position and from her territorial possessions on the Moorish coast of the Mediterranean. In regard to these interests the French Government will come to an understanding with the Spanish Government.

The agreement which may be come to on the subject between France and Spain shall be communicated to His Britannic Majesty's Government.

Article IX

The two Governments agree to afford to one another their diplomatic support, in order to obtain the execution of the clauses of the present Declaration regarding Egypt and Morocco.

In witness whereof His Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the

British Dominions beyond the Seas, Emperor of India, and His Majesty's Principal Secretary of State for Foreign Affairs, duly authorised for that purpose, have signed the present Declaration and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

II

CONVENTION SIGNED AT LONDON, APRIL 8, 1904

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the President of the French Republic, having resolved to put an end, by a friendly Arrangement, to the difficulties which have arisen in Newfoundland, have decided to conclude a Convention to that effect, and have named as their respective Plenipotentiaries:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, the Most Honourable Henry Charles Keith Petty-Fitzmaurice, Marquess of Lansdowne, His Majesty's Principal Secretary of State for Foreign Affairs; and

The President of the French Republic, His Excellency Monsieur Paul Cambon, Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India;

Who, after having communicated to each other their full powers, found in good and due form, have agreed as follows, subject to the approval of their respective Parliaments:—

Article I

France renounces the privileges established to her advantage by Article XIII. of the Treaty of Utrecht, and confirmed or modified by subsequent provisions.

Article II

France retains for her citizens, on a footing of equality with

British subjects, the right of fishing in the territorial waters on that portion of the coast of Newfoundland comprised between Cape St. John and Cape Ray, passing by the north; this right shall be exercised during the usual fishing season closing for all persons on October 20 of each year.

The French may therefore fish there for every kind of fish, including bait and also shell fish. They may enter any port or harbour on the said coast and may there obtain supplies or bait and shelter on the same conditions as the inhabitants of Newfoundland, but they will remain subject to the local Regulations in force; they may also fish at the mouths of the rivers, but without going beyond a straight line drawn between the two extremities of the banks, where the river enters the sea.

They shall not make use of stake-nets or fixed engines without permission of the local authorities.

On the above-mentioned portion of the coast, British subjects and French citizens shall be subject alike to the laws and Regulations now in force, or which may hereafter be passed for the establishment of a close time in regard to any particular kind of fish, or for the improvement of the fisheries. Notice of any fresh laws or Regulations shall be given to the Government of the French Republic three months before they come into operation.

The policing of the fishing on the above-mentioned portion of the coast, and for prevention of illicit liquor traffic and smuggling of spirits, shall form the subject of Regulations drawn up in agreement by the two Governments.

Article III

A pecuniary indemnity shall be awarded by His Britannic Majesty's Government to the French citizens engaged in fishing or the preparation of fish on the "Treaty Shore," who are obliged, either to abandon the establishments they possess there, or to give up their occupation, in consequence of the modification introduced by the present Convention into the existing state of affairs.

This indemnity cannot be claimed by the parties interested unless they have been engaged in their business prior to the closing of the fishing season of 1903.

Claims for indemnity shall be submitted to an Arbitral Tribunal, composed of an officer of each nation, and, in the event of disagreement, of an Umpire appointed in accordance

with the procedure laid down by Article XXXII. of the Hague Convention. The details regulating the constitution of the Tribunal and the conditions of the inquiries to be instituted for the purpose of substantiating the claims, shall form the subject of a special Agreement between the two Governments.

Article IV

His Britannic Majesty's Government, recognising that, in addition to the indemnity referred to in the preceding Article, some territorial compensation is due to France in return for the surrender of her privilege in that part of the Island of Newfoundland referred to in Article II., agree with the Government of the French Republic to the provisions embodied in the following Articles :—

Article V

The present frontier between Senegambia and the English Colony of the Gambia shall be modified so as to give to France Yarbutenda and the lands and landing-places belonging to that locality.

In the event of the river not being open to maritime navigation up to that point, access shall be assured to the French Government at a point lower down on the River Gambia, which shall be recognised by mutual agreement as being accessible to merchant ships engaged in maritime navigation.

The conditions which shall govern transit on the River Gambia and its tributaries, as well as the method of access to the point that may be reserved to France in accordance with the preceding paragraph, shall form the subject of future agreement between the two Governments.

In any case, it is understood that these conditions shall be at least as favourable as those of the system instituted by application of the General Act of the African Conference of February 26, 1885, and of the Anglo-French Convention of June 14, 1898, to the English portion of the basin of the Niger.

Article VI

The group known as the Îles de Los, and situated opposite Konakry, is ceded by His Britannic Majesty to France.

Article VII

Persons born in the territories ceded to France by Articles V.

and VI. of the present Convention may retain British nationality by means of an individual declaration to that effect, to be made before the proper authorities by themselves, or, in the case of children under age, by their parents or guardians.

The period within which the declaration of option referred to in the preceding paragraph must be made shall be one year, dating from the day on which French authority shall be established over the territory in which the persons in question have been born.

Native laws and customs now existing will, as far as possible, remain undisturbed.

In the Îles de Los, for a period of thirty years from the date of exchange of the ratifications of the present Convention, British fishermen shall enjoy the same rights as French fishermen with regard to anchorage in all weathers, to taking in provisions and water, to making repairs, to transhipment of goods, to the sale of fish, and to the landing and drying of nets, provided always that they observe the conditions laid down in the French Laws and Regulations which may be in force there.

Article VIII

To the east of the Niger the following line shall be substituted for the boundary fixed between the French and British possessions by the Convention of June 14, 1898, subject to the modifications which may result from the stipulations introduced in the final paragraph of the present Article.

Starting from the point on the left bank of the Niger laid down in Article III. of the Convention of June 14, 1898, that is to say, the median line of the Dallul Mauri, the frontier shall be drawn along this median line until it meets the circumference of a circle drawn from the town of Sokoto as a centre, with a radius of 160,932 mètres (100 miles). Thence it shall follow the northern arc of this circle to a point situated 5 kilomètres south of the point of intersection of the above-mentioned arc of the circle with the route from Dosso to Matankari *via* Maourédé.

Thence it shall be drawn in a direct line to a point 20 kilomètres north of Konni (Birni-N'Kouni), and then in a direct line to a point 15 kilomètres south of Maradi, and thence shall be continued in a direct line to the point of intersection of the parallel of 13° 20′ north latitude with a meridian passing 70 miles to the east of the second intersection of the 14th degree

of north latitude and the northern arc of the above-mentioned circle.

Thence the frontier shall follow in an easterly direction the parallel of 13° 20′ north latitude until it strikes the left bank of the River Komadugu Waubé (Komadougou Ouobé), the thalweg of which it will then follow to Lake Chad. But, if before meeting this river the frontier attains a distance of 5 kilomètres from the caravan route from Zinder to Yo, through Sua Kololua (Soua Kololoua), Adeber, and Kabi, the boundary shall then be traced at a distance of 5 kilomètres to the south of this route until it strikes the left bank of the River Komadugu Waubé (Komadougou Ouobé), it being nevertheless understood that, if the boundary thus drawn should happen to pass through a village, this village, with its lands, shall be assigned to the Government to which would fall the larger portion of the village and its lands. The boundary will then, as before, follow the thalweg of the said river to Lake Chad.

Thence it will follow the degree of latitude passing through the thalweg of the mouth of the said river up to its intersection with the meridian running 35′ east of the centre of the town of Kouka, and will then follow this meridian southwards until it intersects the southern shore of Lake Chad.

It is agreed, however, that, when the Commissioners of the two Governments at present engaged in delimiting the line laid down in Article IV. of the Convention of June 14, 1898, return home and can be consulted, the two Governments will be prepared to consider any modifications of the above frontier line which may seem desirable for the purpose of determining the line of demarcation with greater accuracy. In order to avoid the inconvenience to either party which might result from the adoption of a line deviating from recognised and well-established frontiers, it is agreed that in those portions of the projected line where the frontier is not determined by the trade routes, regard shall be had to the present political divisions of the territories so that the tribes belonging to the territories of Tessaoua-Maradi and Zinder shall, as far as possible, be left to France, and those belonging to the territories of the British zone shall, as far as possible, be left to Great Britain.

It is further agreed that, on Lake Chad, the frontier line shall, if necessary, be modified so as to assure to France a communication through open water at all seasons between her possessions on the north-west and those on the south-east of the Lake, and a portion of the surface of the open waters of

the Lake at least proportionate to that assigned to her by the map forming Annex 2 of the Convention of June 14, 1898.

In that portion of the River Komadugu which is common to both parties, the populations on the banks shall have equal rights of fishing.

ARTICLE IX

The present Convention shall be ratified, and the ratifications shall be exchanged, at London, within eight months, or earlier if possible.

In witness whereof His Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and His Majesty's Principal Secretary of State for Foreign Affairs, duly authorised for that purpose, have signed the present Convention and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

III

DECLARATION CONCERNING SIAM, MADAGASCAR, AND THE NEW HEBRIDES

I.—SIAM

The Government of His Britannic Majesty and the Government of the French Republic confirm Articles 1 and 2 of the Declaration signed in London on January 15, 1896, by the Marquess of Salisbury, then Her Britannic Majesty's Principal Secretary of State for Foreign Affairs, and Baron de Courcel, then Ambassador of the French Republic at the Court of Her Britannic Majesty.

In order, however, to complete these arrangements, they declare by mutual agreement that the influence of Great Britain shall be recognised by France in the territories situated to the west of the basin of the River Menam, and that the influence of France shall be recognised by Great Britain in the territories situated to the east of the same region, all the Siamese posses-

sions on the east and south-east of the zone above described and the adjacent islands coming thus henceforth under French influence, and, on the other hand, all Siamese possessions on the west of this zone and of the Gulf of Siam, including the Malay Peninsula and the adjacent islands, coming under English influence.

The two Contracting Parties, disclaiming all idea of annexing any Siamese territory, and determined to abstain from any act which might contravene the provisions of existing Treaties, agree that, with this reservation, and so far as either of them is concerned, the two Governments shall each have respectively liberty of action in their spheres of influence as above defined.

II.—Madagascar

In view of the Agreement now in negotiation on the questions of jurisdiction and the postal service in Zanzibar, and on the adjacent coast, His Britannic Majesty's Government withdraw the protest which they had raised against the introduction of the Customs Tariff established at Madagascar after the annexation of that island to France. The Government of the French Republic take note of this Declaration.

III.—New Hebrides

The two Governments agree to draw up in concert an Arrangement which, without involving any modification of the political *status quo*, shall put an end to the difficulties arising from the absence of jurisdiction over the natives of the New Hebrides.

They agree to appoint a Commission to settle the disputes of their respective nationals in the said islands with regard to landed property. The competency of this Commission and its rules of procedure shall form the subject of a preliminary Agreement between the two Governments.

In witness whereof His Britannic Majesty's Principal Secretary of State for Foreign Affairs and His Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, duly authorised for that purpose, have signed the present Declaration and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

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INTERNATIONAL LAW

A TREATISE

BY

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VOL. II.

WAR AND NEUTRALITY



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GENERAL

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PREFACE

TO

THE SECOND VOLUME

In placing before the public this concluding portion of my treatise I would refer my readers to the preface to the first volume for an account of its general scope and method. The present volume bears the title "War and Neutrality," although Parts II. and III. alone treat of these subjects, whereas Part I. is devoted to Settlement of State Differences. It would perhaps have seemed more consistent to deal with this last topic in Volume I.; for a condition of peace must be considered as existing even at a time when use is being made of the machinery for the compulsory settlement of differences. But it is, at any rate, not unusual to treat this topic in an introductory chapter in the discussion of War and Neutrality.

The reader will find that notice is taken of all incidents of legal interest which occurred during the recent Chino-Japanese, South African, and Russo-Japanese Wars. If he belong to the rather numerous class of those who assert that there is no stability in the rules of International Law, which are altering every day and, in an especial measure, during the

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course of each successive war, I am afraid that he may be disappointed; for he will find that in this volume an endeavour is made to master the problems raised by these recent wars by the aid of the rules recognised of old. There are, of course, some problems, such, for instance, as the question of floating mines, which call for new rules. And there can be no doubt that, as every war makes history, so it makes law also, as it settles many rules which previously were doubtful. Thus, for example, I believe that the South African War, which gave rise to the incident of the "Bundesrath," has settled the rule, formerly doubtful, that vessels, although running between neutral ports, can nevertheless be considered to be carrying contraband. And, similarly, I hold that the attitude of the neutral Powers towards the Russian men-of-war, which, during the Russo-Japanese War, asked for asylum in neutral ports, has established the rule that belligerent men-of-war must be dismantled and detained, with their crews, until the conclusion of peace if they require more than merely temporary asylum.

Those who compare this volume with other treatises will, I think, find many new topics here discussed which have hitherto been nowhere treated. For instance, no book has furnished previously a detailed account of the means to be adopted for securing legitimate warfare, and, more especially, of the punishment of war crimes. The arrangement, moreover, of the subjects in Parts II. and III. differs throughout from that of other treatises. This departure from the

usual grouping has not been prompted by desire for novelty : it has been dictated by that need of lucidity which is the prime consideration in a book by a teacher designed for the use of students.

I have tried to write this volume in a truly international spirit, neither taking any one nation's part nor denouncing any other. It is to be deplored that many writers on the law of war and neutrality should take every opportunity of displaying their political sympathies and antipathies, and should confound their own ideas of justice, humanity, and morality with the universally recognised rules of warfare and neutrality. French books often contain denunciation of the Germans and the English; English books—Hall's classical treatise furnishes at once an illustration and a warning—frequently condemn the Germans and the Russians; and the Germans on many occasions retaliate by reproaching the French and the English. It ought surely to be possible to discuss these matters in an impartial spirit. And although it may not be necessary for an author to conceal his opinion on some indefensible act or conduct of some particular nation, he should never forget that *Iliacos intra muros peccatur et extra*, and that his own nation cannot fail to have made many a slip from the narrow path of strict righteousness.

I venture to hope that the Appendix will prove useful to every student. The nine law-making Treaties appended are printed in their French texts, because these are authoritative, and the official English translations published in the Treaty Series

are sometimes inaccurate. I have also appended the Foreign Enlistment Act, 1870, the Naval Prize Act, 1864, and the Naval Prize Courts Act, 1894; they will, I think, be serviceable equally to English and to foreign students.

An arrangement has been made by which the printers have had this present volume indexed in such a way as to facilitate reference to the first volume also. My grateful thanks are again due to Mr. Addis and to Mr. Bucknill for their valuable assistance.

L. OPPENHEIM.

The London School of Economics and
Political Science (University of London),
Clare Market, London, W.C.:
October 24, 1905.

ABBREVIATIONS

OF TITLES OF BOOKS, ETC., QUOTED IN THE TEXT

THE books referred to are, as a rule, quoted with their full titles and the date of their publication. But certain books and periodicals which are very often referred to throughout this work are quoted in an abbreviated form, as follows:—

Annuaire	=	Annuaire de l'Institut de Droit International
Bluntschli	=	Bluntschli, Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, 3rd ed. (1878).
Boeck	=	Boeck, De La Propriété Privée Ennemie Sous Pavillon Ennemi (1882).
Bonfils	=	Bonfils, Manuel De Droit International Public, 4th ed. by Fauchille (1904).
Bulmerincq	=	Bulmerincq, Das Völkerrecht (1887).
Calvo	=	Calvo, Le Droit International, etc., 5th ed., 6 vols. (1896).
Despagnet	=	Despagnet, Cours De Droit International Public, 2nd ed. (1899).
Dupuis	=	Dupuis, Le Droit De La Guerre Maritime D'après Les Doctrines Anglaises Contemporaines (1899).
Field	=	Field, Outlines of an International Code, 2 vols. (1872–1873).
Fiore	=	Fiore, Nouveau Droit International Public, deuxième édition, traduite de l'Italien et annotée par Antoine, 3 vols. (1885).
Gareis	=	Gareis, Institutionen des Völkerrechts, 2nd ed. (1901).
Gessner	=	Gessner, Le Droit Des Neutres Sur Mer (1865).
Grotius	=	Grotius, De Jure Belli ac Pacis (1625).

Hague Regulations	=	Hague Regulations respecting the Laws and Customs of War on Land, adopted by the Hague Peace Conference of 1899.
Hall	=	Hall, A Treatise on International Law 4th ed. (1895).
Halleck	=	Halleck, International Law, 3rd English ed. by Sir Sherston Baker, 2 vols. (1893).
Hartmann	=	Hartmann, Institutionen des praktischen Völkerrechts in Friedenszeiten (1874).
Hautefeuille	=	Hautefeuille, Des Droits Et Des Devoirs Des Nations Neutres En Temps De Guerre Maritime, 3 vols. (2nd ed. 1858).
Heffter	=	Heffter, Das Europäische Völkerrecht der Gegenwart, 8th ed. by Geffcken (1888).
Heilborn, Rechte	=	Heilborn, Rechte und Pflichten der Neutralen Staaten in Bezug auf die während des Krieges auf ihr Gebiet übertretenden Angehörigen einer Armee und das dorthin gebrachte Kriegsmaterial der Kriegführhrenden Partheien (1888).
Heilborn, System	=	Heilborn, Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen (1896).
Holland, Prize Law	=	Holland, A Manual of Naval Prize Law (1888).
Holland, Studies	=	Holland, Studies in International Law (1898).
Holland, Jurisprudence	=	Holland, The Elements of Jurisprudence, 6th ed. (1893).
Holland, War	=	Holland, The Laws and Customs of War on Land, as defined by the Hague Convention of 1899 (1904).
Holtzendorff	=	Holtzendorff, Handbuch des Völkerrechts, 4 vols. (1885–1889).
Kleen	=	Lois et Usages De La Neutralité, 2 vols. (1900).
Klüber	=	Klüber, Europäisches Völkerrecht, 2nd ed. by Morstadt (1851).
Kriegsgebrauch	=	Kriegsgebrauch im Landkriege (1902). (Heft 31 der kriegsgeschichtlichen Einzelschriften, herausgegeben vom Grossen Generalstabe, Kriegsgeschichtliche Abtheilung I.)

Lawrence	=	Lawrence, The Principles of International Law, 3rd ed. (1900).
Lawrence, Essays	=	Lawrence, Essays on some Disputed Questions of Modern International Law, 2nd ed. (1885).
Lawrence, War	=	Lawrence, War and Neutrality in the Far East, 2nd ed. (1904).
Liszt	=	Liszt, Das Völkerrecht, 3rd ed. (1904).
Longuet	=	Longuet, Le Droit Actuel De La Guerre Terrestre (1901).
Lorimer	=	Lorimer, The Institutes of International Law, 2 vols. (1883–1884).
Maine	=	Maine, International Law, 2nd ed. (1894).
Manning	=	Manning, Commentaries on the Law of Nations, new ed. by Sheldon Amos (1875).
Martens	=	Martens, Völkerrecht, German translation of the Russian original in 2 vols. (1883).
Martens, G. F.	=	G. F. Martens, Précis Du Droit Des Gens Moderne De l'Europe, nouvelle éd. by Vergé, 2 vols. (1858).
Martens, R. Martens, N. R. Martens, N. S. Martens, N. R. G. Martens, N. R. G., 2nd ser.		These are the abbreviated quotations of the different parts of Martens, Recueil de Traités (see p. 94 of vol. I.), which are in common use.
Martens, Causes Célèbres	=	Martens, Causes Célèbres du Droit des Gens, 5 vols., 2nd ed. (1858–1861).
Mérignhac	=	Mérignhac, Les Lois Et Coutumes De La Guerre Sur Terre (1903).
Nys	=	Nys, Le Droit International, vol. i. (1904).
Ortolan	=	Ortolan, Règles Internationales et Diplomatie de la Mer, 2 vols., 3rd ed. (1856).
Perels	=	Perels, Das Internationale öffentliche Seerecht der Gegenwart, 2nd ed. (1903).
Phillimore	=	Phillimore, Commentaries upon International Law, 4 vols. 3rd ed. (1879–1888).
Piedelièvre	=	Piedelièvre, Précis De Droit International Public, 2 vols. (1894–1895).
Pillet	=	Pillet, Les Lois Actuelles De La Guerre (1901).

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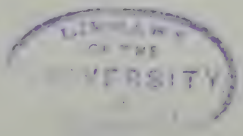
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PART I

SETTLEMENT OF STATE DIFFERENCES



CHAPTER I

AMICABLE SETTLEMENT OF STATE DIFFERENCES

I

State Differences and their Amicable Settlement in General

Twiss, II. §§ 1–3—Ullmann, § 131—Bulmerincq in Holtzendorff, IV. pp. 5–12—Heffter, §§ 105–107—Rivier, II. § 57—Bonfils, No. 930—Pradier-Fodéré, IV. Nos. 2580–2583—Calvo, III. §§ 1670–1671—Martens, II. §§ 101–102—Fiore, II. Nos. 1192–1198—Wagner, "Zur Lehre von den Streiterledigungsmitteln des Völkerrechts" (1900).

Legal and political International Differences

§ 1. International differences may arise from a variety of grounds. Between the extreme causes of a simple and comparatively unimportant act of discourtesy committed by one State against another, on the one hand, and, on the other, of so gross an insult as must necessarily lead to war, there are many other grounds varying in nature and importance. State differences are correctly divided into legal and political. Legal differences arise from acts for which States have to bear responsibility, be it acts of their own or of their Parliaments, judicial and administrative officials, armed forces, or individuals living on their territory.[1] Political differences are the result of a conflict of political interests. But although this distinction is certainly theoretically correct and of practical importance, in practice a sharp line can frequently not be drawn. For in

[1] See above, Vol. I. § 149.

many cases States either hide their political interests behind a claim for an alleged injury, or they make a positive, but comparatively insignificant, injury a pretext for the carrying out of political ends. Nations which have been for years facing each other armed to the teeth, waiting for a convenient moment to engage in hostilities, are only too ready to obliterate the boundary line between legal and political differences. Between such nations a condition of continuous friction prevails which makes it difficult, if not impossible, in every case which arises to distinguish the legal from the political character of the difference.

International Law not exclusively concerned with Legal Differences.

§ 2. It is often maintained that the Law of Nations is concerned with legal differences only, political differences being a matter not of law but of politics. Now it is certainly true that only legal differences can be settled through a juristic decision of the underlying juristic question, whatever may be the way in which such decision is arrived at. But although political differences cannot be the object of a juristic decision, they may be settled short of war by some amicable or compulsive means. And legal differences, although within the scope of a juristic decision, may be of such kinds as to prevent the parties from submitting them to such decision, without being thereby of such a nature that they cannot be settled peaceably at all. Moreover, although the distinction between legal and political differences is certainly correct in theory and of importance in practice, nevertheless in practice a sharp line frequently cannot be drawn, as has just been pointed out. Therefore the Law of Nations is not exclusively concerned with legal differences, for in fact all amicable means of settling legal differences

are at the same time means of settling political differences, and so are two of the compulsive means of settling differences—namely, pacific blockade and intervention.

Amicable in contradistinction to compulsive settlement of Differences.

§ 3. Political and legal differences may be settled either by amicable or by compulsive means. There are four kinds of amicable means—namely, negotiation between the parties, good offices of third parties, mediation, and arbitration.[1] And there are also four kinds of compulsive means—namely, retorsion, reprisals (including embargo), blockade, and intervention of third States. No State is allowed to make use of compulsive means before the amicable means of negotiation has been tried, but there is no necessity for the good offices or mediation of third States, and eventually arbitration, to be tried beforehand also. Frequently, however, States nowadays make use of the so-called Compromise Clause[2] in their treaties, stipulating thereby that any differences arising between the contracting parties with regard to matters regulated by, or to the interpretation of, the respective treaties shall be settled through the amicable means of arbitration to the exclusion of all compulsive means. And there are even a few examples of States which have concluded treaties stipulating that all differences, without exception, that might arise between them should be amicably settled by arbitration.[3] These exceptions, however,

[1] Some writers (see Hall, § 118, and Heilborn, System, p. 404) refuse to treat negotiation, good offices, and mediation as means of settling differences, because they cannot find that these means are of any legal value, it being in the choice of the parties whether or not they agree to make use of them. They forget, however, the enormous political value of these means, which alone well justifies their treatment; moreover, there are already some positive legal rules in existence concerning these means—see Hague Arbitration Treaty, articles 2–7 and 9–14—and others will in time, no doubt, be established.

[2] See above, Vol. I. § 553.

[3] See below, § 17.

only confirm the rule that no international legal duty exists for States to settle their differences amicably through arbitration, or even to try to settle them in this way, before they make use of compulsive means.

II

Negotiation

Twiss, II. § 4—Taylor, §§ 359-360—Heffter, § 107—Bulmerincq in Holtzendorff, IV. pp. 13-17—Ullmann, § 132—Bonfils, Nos. 931-932—Pradier-Fodéré, VI. Nos. 2584-2587—Rivier, II. § 57—Calvo, III. §§ 1672-1680—Martens, II. § 103.

In what Negotiation consists.

§ 4. The simplest means of settling State differences, and that to which States resort regularly before they make use of other means, is negotiation. It consists in such acts of intercourse between the parties as are initiated and directed for the purpose of effecting an understanding and thereby amicably settling the difference that has arisen between them.[1] Negotiation as a rule begins by a State complaining of a certain act, or lodging a certain claim with another State. The next step is a statement from the latter making out its case, which is handed over to the former. It may be that the parties come at once to an understanding through this simple exchange of statements. If not, other acts may follow according to the requirements of the special case. Thus, for instance, other statements may be exchanged, or a conference of diplomatic envoys, or even of the heads of the States at variance, may be arranged for the purpose of discussing the differences and preparing the basis for an understanding.

[1] See above, Vol. I. §§ 477-482, where the international transaction of negotiation in general is discussed.

§ 5. The signatory Powers of the Hague Convention for the peaceful settlement of international differences (articles 9–14) recommend that, if the ordinary diplomatic negotiation has failed to settle differences, the parties shall institute an International Commission of Inquiry [1] for the purpose of elucidating the facts underlying the difference by an impartial and conscientious investigation. The rules laid down by the Convention for such commissions are the following:—

International Commissions of Inquiry.

The Commission is to be constituted by a special treaty between the conflicting parties, and such treaty is to specify the facts that are to be examined, the extent of the powers of the commissioners, and the procedure to be followed. Both sides must be heard at the inquiry. The forms and periods of procedure have to be specified by the Commission itself, in case they are not stipulated by the treaty arranging an inquiry. The formation of the Commission, if not otherwise stipulated, takes place by each party appointing two Commissioners, who together choose an umpire. After having elucidated the facts, the Commission makes a Report and communicates it, signed by all the members of the Commission, to the conflicting Powers. This report is absolutely limited to a statement of the facts, it has in no way the character of an arbitral award, and it leaves the conflicting parties entire freedom as to the effect to be given to such statement.[2]

[1] See Holls, The Peace Conference at the Hague (1900), pp. 203–320.

[2] The first occasion when an International Commission of Inquiry was instituted arose in 1904. On October 24 of that year, during the Russo-Japanese war, the Russian Baltic fleet, which was on its way to the Far East, fired into the Hull fishing fleet off the Dogger Bank, in the North Sea, whereby two fishermen were killed and considerable damage was done to several trawlers. Great Britain demanded from Russia not only an apology and ample damages, but also severe punishment of the

Effect of Negotiation.

§ 6. The effect of negotiation may be to make it apparent that the parties cannot come to an amicable understanding at all. But frequently the effect is that one of the parties acknowledges the claim of the other party. Again, sometimes negotiation results in a party, although it does not acknowledge the opponent's alleged rights, waiving its own rights for the sake of peace and for the purpose of making friends with the opponent. And, lastly, the effect of negotiation may be a compromise between the parties. Frequently the parties, after having come to an understanding, conclude a treaty by which they embody the terms of the understanding arrived at through negotiation. The practice of every-day life shows clearly the great importance of negotiation as a means of settling international differences. The modern development of international traffic and transport, the fact that individuals are constantly travelling on foreign territories, the keen interest taken by all powerful States in colonial enterprise,

officer responsible for the outrage. As Russia maintained that the firing of the fleet was caused by the approach of some Japanese torpedo-boats, and that she could therefore not punish the officer in command, the parties agreed upon the establishment of an International Commission of Inquiry, which, however, was charged not only to ascertain the facts of the incident but also to pronounce an opinion concerning the responsibility for the incident and the degree of blame attaching to the responsible persons. The Commission consisted of five naval officers of high rank—namely, one British, one Russian, one American, one French, and one Austrian, who sat at Paris in February 1905. The report of the Commission states that no torpedo-boats had been present, that the opening of fire on the part of the Baltic fleet was not justifiable, that Admiral Rojdestvensky, the commander of the Baltic fleet, was responsible for the incident, but that these facts were "not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky or of the *personnel* of his squadron." In consequence of the last part of this report Great Britain could not insist upon any punishment to be meted out to the responsible Russian Admiral, but Russia paid a sum of 65,000*l.* to indemnify the victims of the incident and the families of the two dead fishermen.

and many other factors, make the daily rise of differences between States unavoidable. Yet the greater number of such differences are always settled through negotiation of some kind or other.

III

Good Offices and Mediation

Maine, pp. 207-228—Phillimore, III. §§ 3-5—Twiss, II. § 7—Taylor, §§ 359-360—Wheaton, § 73—Bluntschli, §§ 483-487—Heffter, §§ 107-108—Bulmerincq in Holtzendorff, IV. pp. 17-30—Ullmann, § 133—Bonfils, Nos. 933-943—Despagnet, Nos. 480-483—Pradier-Fodéré, VI. Nos. 2588-2593—Rivier, II. § 58—Calvo, III. §§ 1682-1705—Fiore, III. Nos. 1199-1201—Martens, II. § 103—Holls, "The Peace Conference at the Hague" (1900), pp. 176-203.

Occasions for Good Offices and Mediation.

§ 7. When parties are not inclined to settle their differences by negotiation, or when they have negotiated without effecting an understanding, a third State may procure a settlement through its good offices or its mediation, whether only one or both parties have asked for the help of the third State or the latter has spontaneously offered it. There is also possible a collective mediation, several States acting at the same time as mediators. It is further possible for a mediatorial Conference or Congress to meet for the purpose of discussing the terms of an understanding between the conflicting parties. And it must be especially mentioned that good offices and mediation are not confined to the time before the differing parties have appealed to arms; they may also be offered and sought during hostilities for the purpose of bringing the war to an end. It is during war in particular that good offices and mediation are of great value, neither of the belligerents as a rule

being inclined to open peace negotiations on his own account.

Right and duty of offering, requesting, and rendering Good Offices and Mediation.

§ 8. As a rule, no duty exists for a third State to offer its good offices or mediation, or to respond to a request of the conflicting States for such, nor is it, as a rule, the duty of the conflicting parties themselves to ask or to accept a third State's good offices and mediation. But by special treaty such duty may be stipulated. Thus, for instance, by article 8 of the Peace Treaty of Paris of March 30, 1856, between Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey, it was stipulated that, in case in the future such difference as threatened peace should arise between Turkey and one or more of the signatory Powers, the parties should be obliged, before resorting to arms, to ask for mediation of the other signatory Powers. Thus, further, article 12 of the General Act of the Berlin Congo Conference of 1885 stipulates that, in case a serious difference should arise between some of the signatory Powers as regards the Congo territories, the parties should, before resorting to arms, be obliged to ask the other signatory Powers for their mediation. And lately the Hague Convention for the peaceful settlement of international differences laid down some stipulations respecting the right and duty of good offices and mediation, which will be found below in § 10.

Good Offices in contradistinction to Mediation.

§ 9. Diplomatic practice frequently does not distinguish between good offices and mediation. But although good offices may easily develop into mediation, they must not be confounded with it. The difference between them is that, whereas good offices consist in various kinds of actions tending to call negotiations between the conflicting States into existence, mediation consists in a direct conduct of

negotiations between the differing parties on the basis of proposals made by the mediator. Good offices seek to induce the conflicting parties, who are either not at all inclined to negotiate with each other or who have negotiated without effecting an understanding, to enter or to re-enter into such negotiations. Good offices may also consist in advice, in submitting a proposal of one of the parties to the other, and the like, but they never interfere in the negotiations themselves. On the other hand, the mediator is the middleman who takes part in the negotiations. He makes certain propositions on the basis of which the States at variance may come to an understanding. He even conducts the negotiations himself, always anxious to reconcile the opposing claims and to appease the feeling of resentment between the parties. All the efforts of the mediator may often, of course, be useless, the differing parties being unable or unwilling to consent to an agreement. But if an understanding is arrived at, the position of the mediator as a party to the negotiation, although not a participator in the difference, frequently becomes clearly apparent either by the drafting of a special act of mediation which is signed by the States at variance and the mediator, or by the fact that in the convention between the conflicting States, which stipulates the terms of their understanding, the mediator is mentioned.

Good Offices and Mediation according to the Hague Arbitration Convention.

§ 10. The Hague Convention of 1899 for the peaceful settlement of international differences undertakes in its articles 2–7 the task of making the signatory Powers have recourse more frequently than hitherto to good offices and mediation, and of creating a new and particular form of mediation. Its rules are the following :—

(1) The signatory Powers agree to have recourse, before they appeal to arms, as far as circumstances allow, to good offices or mediation (article 2). And independently of this recourse, they consider it useful that signatory Powers who are strangers to the dispute should, on their own initiative, offer their good offices or mediation (article 3). A real legal duty to offer good offices or mediation is not thereby created; the usefulness of such offer only is recognised. In regard to the legal duty of conflicting States to ask for good offices or mediation, it is obvious that, although literally such duty is agreed upon, the condition "as far as circumstances allow" makes it more or less illusory, as it is in the discretion of the parties to judge for themselves whether or not the circumstances of the special case allow their having recourse to good offices and mediation.

(2) The signatory Powers agree that (article 3) a right to offer good offices or mediation exists for those of them who are strangers to a dispute, and that this right exists also after the conflicting parties have appealed to arms. Consequently, every signatory Power, when at variance with another, be it before or after the outbreak of hostilities, is in duty bound to receive an offer made for good offices or mediation, although it need not accept such offer. And it is especially stipulated that the exercise of the right to offer good offices or mediation can never be regarded by the conflicting States as an unfriendly act (article 3). It is, further, stipulated (article 27) that the signatory Powers consider it their duty to remind the parties in a serious conflict of the permanent Court of Arbitration, and that the advice to have recourse to this Court can only be considered as an exercise of good offices.

(3) Mediation is defined (article 4) as reconciliation of the opposing claims and appeasement of the feelings of resentment between the conflicting States, and it is specially emphasised that good offices and mediation have exclusively the character of advice.

(4) The acceptance of mediation—and, of course, of good offices, which is not mentioned—does not (article 7), have the effect of interrupting, delaying, or hindering mobilisation or other preparatory measures for war, or of interrupting military operations when war has broken out before the acceptance of mediation, unless there should be an agreement to the contrary.

(5) The functions of the mediator are at an end (article 5) when once it is stated, either by one of the conflicting parties or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

(6) A new and particular form of mediation is recommended by article 8. Before appealing to arms the conflicting States choose respectively a State as umpire, to whom each intrusts the mission of entering into direct communication with the umpire chosen by the other side for the purpose of preventing the rupture of pacific relations. The period of the mandate extends, unless otherwise stipulated, to thirty days, and during such period the conflicting States cease from all direct communication on the matter in dispute, which is regarded as referred exclusively to the mediating umpires, who must use their best efforts to settle the difference. Should such mediation not succeed in bringing the conflicting States to an understanding, and should consequently a definite rupture of pacific relations take place, the chosen umpires are charged with the joint task of

taking advantage of any opportunity to restore peace.

Value of Good Offices and Mediation.

§ 11. The value of good offices and mediation for the amicable settlement of international conflicts, be it before or after the parties have appealed to arms, cannot be over-estimated. Hostilities have been frequently prevented through the authority and the skill of mediators, and furiously raging wars have been brought to an end through good offices and mediation of third States.[1] Nowadays the importance of these means of settlement of international differences is even greater than in the past. The outbreak of war is under the circumstances and conditions of our times no longer a matter of indifference to all except the belligerent States, and no State which goes to war knows exactly how far such war may affect its very existence. If good offices and mediation interpose at the right moment, they will in many cases not fail to effect a settlement of the conflict. The stipulations of the Hague Convention for the peaceful adjustment of differences have greatly enhanced the value of good offices and mediation by giving a legal right to Powers, strangers to the dispute, to offer their good offices and mediation before and during hostilities.

[1] See the important cases of mediation discussed by Calvo, III. §§ 1684–1700, and Bonfils, Nos. 936–942. From our own days the case of the Dogger Bank incident of 1904 may be quoted as an example, for it was through the mediation of France that Great Britain and Russia agreed upon the establishment of an International Commission of Inquiry. (See p. 7, note 2.) And the good offices of the President of the United States of America induced Russia and Japan, in August 1905, to open the negotiations which actually led to the conclusion of the Peace of Portsmouth on September 5, 1905.

IV

Arbitration

Grotius, II. c. 23, § 8—Vattel, II. § 329—Hall, § 119—Westlake, I. pp. 332-356—Lawrence, §§ 241-242—Phillimore, III. §§ 3-5—Twiss, II. § 5—Taylor, §§ 357-358—Wharton, III. § 316—Bluntschli, §§ 488-498—Heffter, § 109—Bulmerincq in Holtzendorff, IV. pp. 30-58—Ullmann, § 134—Bonfils, Nos. 944-969—Despagnet, Nos. 699-713—Pradier-Fodéré, VI. Nos. 2602-2630—Rivier, II. § 59—Calvo, III. §§ 1706-1806—Fiore, II. Nos. 1202-1215—Martens, II. § 104—Rouard de Card, "L'arbitrage international" (1876)—Mérignhac, "Traité théorique et pratique de l'arbitrage" (1895)—Moore, "History and Digest of the Arbitrations to which the United States has been a Party," 6 vols. (1898)—Darby, "International Arbitration," 4th ed. (1904)—Dumas, "Les sanctions de l'arbitrage international" (1905)—Lapradelle et Politis, "Recueil des arbitrages internationaux," I. (1798-1855), (1905).

Conception of Arbitration.

§ 12. Arbitration is the name for the determination of differences between States through the verdict of one or more umpires chosen by the parties. As there is no central political authority above, and no such International Court as could exercise jurisdiction over, the Sovereign States, State differences, unlike differences between private individuals, cannot as a rule be obligatorily settled in courts of justice. The only way in which a settlement of State differences through a verdict may be arrived at is that the conflicting States voluntarily consent to submit themselves to a verdict of one or more umpires chosen by themselves for that purpose.

Treaty of Arbitration.

§ 13. It is, therefore, necessary for such conflicting States as intend to have the conflict determined by arbitration to conclude a treaty by which they agree to this course. Such treaty of arbitration involves the obligation of both parties to submit in good faith to the decision of the arbitrators. Frequently a treaty of arbitration will be concluded

after the outbreak of a difference, but it also frequently happens that States concluding certain treaties stipulate therein at once, by the so-called Compromise Clause,[1] that any difference arising between the parties respecting matters regulated by such treaty shall be determined by arbitration. Two or more States can also conclude a so-called general treaty of arbitration, or treaty of permanent arbitration, stipulating that all or certain kinds of differences in future arising between them shall be settled by this method. Thus article 7 of the Commercial Treaty between Holland and Portugal[2] of July 5, 1894, contains such a general treaty of arbitration, as it stipulates arbitration not only for differences respecting matters of commerce, but for all kinds of differences arising in the future between the parties, provided these differences do not concern their independence or autonomy. Before the Hague Peace Conference of 1899, however, general treaties of arbitration were not numerous. But public opinion everywhere was aroused in favour of general arbitration treaties through the success of this conference, with the result that from 1900 to the present day many general arbitration treaties have been concluded.[3]

Who is to arbitrate ?

§ 14. States which conclude an arbitration treaty have to agree upon the arbitrators. If they choose a third State as arbitrator, they have to conclude a treaty (*receptum arbitri*) with such State, by which they appoint the chosen State and by which such State accepts the appointment. The appointed State chooses on its own behalf those umpires who actually serve as arbitrators. It may happen that the conflicting States choose a head of a third State as

[1] See above, § 3.
[2] See Martens, N.R.G., 2nd ser. XXII. p. 590.
[3] See below, § 17.

arbitrator. But such head never himself investigates the matter; he chooses one or more individuals, who make a report and propose a verdict, which he pronounces. And, further, the conflicting States may agree to entrust the arbitration to any other individual or to a body of individuals, a so-called Arbitration Committee or Commission. Thus the arbitration of 1900 in regard to the Venezuelan Boundary Dispute between Great Britain, Venezuela, and the United States was conducted by a Commission, sitting at Paris, consisting of American and English members and the Russian Professor van Martens as President. And the Alaska Boundary Dispute between Great Britain and the United States was settled in 1903 through the award of a Commission, sitting at London, consisting of American and Canadian members, with Lord Alverstone, Lord Chief Justice of England, as President.

On what principles Arbitrators proceed and decide.

§ 15. The treaty of arbitration must stipulate the principles according to which the arbitrators have to give their verdict. These principles may be the general rules of International Law, but they may also be the rules of any Municipal Law chosen by the conflicting States, or rules of natural equity, or rules specially stipulated in the treaty of arbitration for the special case.[1] And it may also happen that the treaty of arbitration stipulates that the arbitrators shall compromise the conflicting claims of the parties without resorting to special rules of law. The treaty of arbitration, further, regularly stipulates the procedure to be followed by the arbitrators investigating and determining the difference. If a treaty of arbitration does not lay down rules of procedure, the

[1] See below, § 335, concerning the "Three rules of Washington."

arbitrators themselves have to work out such rules and to communicate them to the parties.

Binding force of arbitral verdict.

§ 16. An arbitral verdict is final if the arbitration treaty does not stipulate the contrary, and the verdict given by the arbitrators is binding upon the parties. As, however, no such central authority exists above the States as could execute the verdict against a State refusing to submit, it is in such a case the right of the other party to enforce the arbitral decision by compulsion. Yet it is obvious that an arbitral verdict is binding under the condition only that the arbitrators have in every way fulfilled their duty as umpires and have been able to find their verdict in perfect independence. If they have been bribed or have not followed their instructions, if their verdict has been given under the influence of coercion of any kind, or if one of the parties has intentionally and maliciously led the arbitrators into an essential material error, the arbitral verdict has no binding force whatever.

What differences can be decided by Arbitration.

§ 17. It is often maintained that every possible difference between States could not be determined by arbitration, and, consequently, efforts are made to distinguish those groups of State differences which are determinable by arbitration from the others. Now, although all the States may never consent to have all possible differences decided by arbitration, theoretically there is no reason for a distinction between differences decidable and undecidable through arbitration. For there can be no doubt that, the consent of the parties once given, every possible difference might be settled through arbitration, whether the verdict is based on the rules of International Law or rules of natural equity, or the opposing claims are compromised. But, different from the

theoretical question, what differences are and what are not determinable by arbitration, is the question what kind of State differences *ought* always to be settled in this manner. The latter question has been answered by article 16 of the Hague Convention for the peaceful adjustment of international differences, the signatory Powers therein recognising arbitration as the most efficacious and at the same time the most equitable means of determining differences of a judicial character in general, and in especial differences regarding the interpretation or application of international treaties. But future experience must decide whether the signatory Powers will in practice always act according to this distinction. One cannot help thinking that under certain circumstances and conditions a State might refuse to consent to arbitration upon even such difference as has a judicial character. However, it must be mentioned that several States, following the suggestion of this article 16, have concluded treaties in which they agree to settle differences of a legal nature by arbitration, provided these differences do not affect the vital interests, the independence, or the honour of the contracting parties. Thus Great Britain in 1903 and 1904 entered into arbitration agreements of this kind with France, Spain, Italy, Germany, Sweden, Norway, Portugal, and Austria-Hungary. Although these agreements were concluded for five years only, they will certainly be renewed. And the fact is of importance that Denmark and Holland, on February 12, 1904, entered into an arbitration agreement according to which all differences, without exception, have to go before an arbitration tribunal.[1]

[1] Already on July 23, 1898— see Martens, N.R.G., 2nd ser. XXIX. p. 137 — Argentina and Italy had concluded a treaty

Value of Arbitration.

§ 18. There can be no doubt that arbitration is, and with every day becomes more and more, of great importance. History proves that already in antiquity and during the Middle Ages arbitration was occasionally[1] made use of as a peaceable means of settling international differences. But, although an International Law made its appearance in modern times, during the sixteenth, seventeenth, and eighteenth centuries very few cases of arbitration occurred. It was not before the end of the eighteenth century that arbitration was frequently made use of. There are 177 cases from 1794 to the end of 1900.[2] This number shows that the inclination of States to agree to arbitration has increased, and there can be no doubt that arbitration has a great future. States and the public opinion of the whole world become more and more convinced that there are a good many international differences which may well be determined by arbitration without any danger whatever to the national existence, independence, dignity, and prosperity of the States concerned. A net of so-called Peace Societies has spread over the whole world, and their members unceasingly work for the promotion of arbitration. The Parliaments of several countries have repeatedly given their vote in favour of arbitration; and the Hague Peace Conference of 1899 created a permanent Court of Arbitration, a step by which a new epoch of the development of International Law was inaugurated.

according to which all differences without exception shall be settled by arbitration. See also above, § 3, concerning the Compromise Clause.

[1] See examples in Calvo, III. §§ 1707–1712, and in Nys, Les origines du droit international (1894), pp. 52–61.

[2] See La Fontaine's Histoire sommaire et chronologique des arbitrages internationaux in R.I., 2nd ser. IV. pp. 349, 558, 623.

V

Arbitration according to the Hague Convention

Holls, "The Peace Conference at the Hague" (1900)—Martens, "La conférence de la paix à la Haye" (1900)—Mérignhac, "La conférence internationale de la paix" (1900).

Arbitral Justice in general.

§ 19. Of the 61 articles of the Hague Convention for the peaceful adjustment of international differences, not fewer than 43—namely, articles 15-57—deal with arbitration in three chapters headed "On Arbitral Justice," "On the Permanent Court of Arbitration," and "On Arbitral Procedure." The first chapter, articles 15–19, contains rules on arbitral justice in general, which are, however, with one exception, not of a legal but of a mere doctrinal character. Thus the definition of article 15, "International arbitration has for its object the determination of controversies between States by judges of their own choice, upon the basis of respect for law," is as doctrinal as the assertion of article 16: "In questions of a judicial character, and especially in questions regarding the interpretation or application of International Treaties or Conventions, arbitration is recognised by the signatory Powers as the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic methods." And the provision of article 17, that an agreement of arbitration may be made respecting disputes already in existence or arising in the future and may relate to every kind of controversy or solely to controversies of a particular character, is as doctrinal as the reservation of article 19, which runs: "Independently of existing general or special treaties imposing the obligation to

have recourse to arbitration on the part of any of the signatory Powers, these Powers reserve to themselves the right to conclude, either before the ratification of the present Convention or afterwards, new general or special agreements with a view to extending obligatory arbitration to all cases which they consider possible to submit to it." The only rule of legal character is that of article 18, enacting the already existing customary rule of International Law, that "the agreement of arbitration implies the obligation to submit in good faith to the arbitral sentence."

On the signatory Powers no obligation whatever is imposed to submit any difference to arbitration. Even differences of a judicial character, and especially those regarding the interpretation or application of treaties, for the settlement of which the signatory Powers in article 16 acknowledge arbitration as the most efficacious and at the same time the most equitable method, need not necessarily be submitted to arbitration. It should, however, be mentioned that originally a stipulation was intended which made arbitration obligatory for several kinds of differences.[1]

[1] According to Holls, The Peace Conference at the Hague, p. 227, this stipulation was as follows:

"From and after the ratification of the present treaty by all the signatory Powers, arbitration shall be obligatory in the following cases so far as they do not affect vital interests or the national honour of the contracting States.

"(I) In the case of differences or conflicts regarding pecuniary damages suffered by a State or its citizens, in consequence of illegal or negligent action on the part of any State or the citizens of the latter.

"(II) In the case of disagreements or conflicts regarding the interpretation or application of treaties or conventions upon the following subjects:

"1. Treaties concerning postal and telegraphic service and railways, as well as those having for their object the protection of submarine telegraphic cables; Rules concerning the means of preventing collisions on the high seas; Conventions concerning the navigation of international rivers and inter-oceanic canals.

"2. Conventions concerning the protection of literary and artistic property, as well as industrial and proprietary rights (patents, trade marks, and commercial names); Conventions regarding monetary affairs, weights and measures;

Arbitration Treaty and appointment of Arbitrators.

§ 20. According to article 31 the conflicting States which resort to arbitration shall sign a special act, in which the object of their difference is clearly defined, as well as the extent of the powers of the arbitrators. The parties may agree to have recourse to the permanent Court of Arbitration which was instituted by the Hague Convention and regarding which details have been given above, Vol. I., §§ 472–476, but they may also assign the arbitration to one or several arbitrators chosen by them either from the members of the permanent Court of Arbitration or elsewhere (article 32). If they choose a head of a State as arbitrator, the whole of the arbitral procedure is to be determined by him (article 33). If they choose several arbitrators, an umpire is to preside, but in case they have not chosen an umpire, the arbitrators are to elect one of their own number as president (article 34). In case of death, resignation, or disability from any cause of one of the arbitrators, his place is to be filled in accordance with the method of his appointment (article 35). The place of session of the arbitrators is to be determined by the parties; but if they fail to do it, the place of session is to be the Hague, and the place of session cannot, except in case of *force majeure*, be changed by the arbitrators without the consent of the parties (article 36). The International Bureau [1] of the Court at the Hague is authorised to put its offices and its staff at the disposal of the signatory Powers in case the parties have preferred to bring their dispute

Conventions regarding sanitary affairs and veterinary precautions and measures against the phylloxera.

"3. Conventions regarding inheritances, extradition, and mutual judicial assistance.

"4. Boundary Conventions or Treaties, so far as they concern purely technical and not political questions."

[1] See above, Vol. I. § 474.

before other arbitrators than the permanent Court of Arbitration (article 26).

Procedure of and before the Arbitral Tribunal.

§ 21. The parties can agree upon such rules of arbitral procedure as they like. If they fail to stipulate special rules of procedure, the following rules are valid, whether the parties have brought their case before the permanent Court of Arbitration or have chosen other arbitrators (article 30) :—

(1) The parties can appoint counsel or advocates for the defence of their rights before the tribunal. They can also appoint delegates or special agents to attend the tribunal for the purpose of serving as intermediaries between them and the tribunal (article 37).

(2) The tribunal selects the language for its own use and authorised for use before it (article 38).

(3) As a rule the arbitral procedure is divided into the two distinct phases of preliminary proceedings and of discussion in Court. Preliminary proceedings consist in the communication by the respective agents to the members of the tribunal and to the opposite party of all printed or written acts and of all documents containing the arguments invoked in the case. This communication is to be made in the form and within periods fixed by the tribunal (article 39) ; for the latter is authorised to issue rules of procedure for the conduct of the case, to determine the form and periods of time in which each party must conclude its arguments, and to prescribe all formalities required for dealing with the evidence (article 49). Every document produced in the preliminary proceedings by one party must be communicated to the other party (article 40).

(4) Upon the conclusion of the preliminary proceedings follows the discussion in Court ; it consists

in the oral development before the tribunal of the arguments of the parties (article 39). The discussions are under the direction of the president of the tribunal, and are public only if it be so decided by the tribunal with the consent of the parties. Minutes are to be drawn up with regard to the discussion by secretaries appointed by the president, and these official minutes alone are authentic (article 41). During the discussion in Court the agents and counsel of the parties are authorised to present to the tribunal orally all the arguments they may think expedient in support of their case. They are likewise authorised to raise objections and to make incidental motions, but the decisions of the tribunal on these objections and motions are final and cannot form the object of any further discussion (articles 45, 46). Every member of the tribunal may put questions to the agents and counsel of the parties and demand explanations from them on doubtful points, but neither such questions nor other remarks made by members of the tribunal can be regarded as expressions of opinion by the tribunal in general or the respective member in particular (article 47). The tribunal can always require from the agents of the parties all necessary explanations and the production of all acts, and in case of refusal the tribunal takes note of it in the minutes (article 44).

When the competence of the tribunal is doubted on one or more points, the tribunal itself is authorised to decide whether it is or is not competent, by means of interpretation of the arbitration treaty or of other treaties which may be invoked in the case, and by means of the application of the principles of International Law (article 48).

During the discussion in Court—article 42 says, "After the conclusion of the preliminary proceedings"—the tribunal is competent to refuse admittance to all such fresh acts and documents as one party may desire to submit to the tribunal without the consent of the other party (article 42). Consequently, the tribunal must admit such fresh acts and documents when both parties agree to their submission. On the other hand, the tribunal is always competent to take into consideration fresh acts and documents to which its attention is drawn by the agents or counsel of the parties, and in such cases the tribunal can require proof of these acts and production of the documents, but it is at the same time obliged to show the latter to the other party (article 43).

As soon as the agents and counsel of the parties have submitted all explanations and evidence in support of their case, the president declares the discussion closed (article 50).

Arbitral Award.

§ 22. The arbitral award is given after a deliberation which takes place with closed doors. The members of the tribunal vote, and the majority of the votes makes the decision of the tribunal. In case a member refuses to vote, a note of it must be made in the minutes (article 51). The decision, accompanied by a statement of the considerations upon which it is based, is to be drawn up in writing and to be signed by each member of the tribunal; the dissenting members, however, may record their dissent when signing (article 52). The verdict is read out at a public meeting of the tribunal, the agents and counsel of the parties being present or having been duly summoned to attend (article 53).

Binding force of Awards.

§ 23. The award, when duly pronounced and

notified to the agents of the parties, decides the dispute finally and without appeal (article 54). The parties may, however, beforehand stipulate in the treaty of arbitration the possibility of an appeal. In such case, and the treaty of arbitration failing to stipulate the contrary, the demand for a rehearing of the case must be addressed to the tribunal which pronounced the award. The demand for a rehearing of the case can only be made on the ground of the discovery of some new fact such as may exercise a decisive influence on the award, and which at the time when the discussion was closed was unknown to the tribunal as well as to the appealing party. Proceedings for a rehearing can only be opened after a decision of the tribunal expressly stating the existence of a new fact of the character described, and declaring the demand admissible on this ground. The treaty of arbitration must stipulate the period of time within which the demand for a rehearing must be made (article 55).

The Hague Convention contains no stipulation whatever with regard to the question whether the award is binding under all circumstances and conditions, or whether it is only binding when the tribunal has in every way fulfilled its duty and has been able to find its verdict in perfect independence. But it is obvious that the award has no binding force whatever if the tribunal has been bribed or has not followed the parties' instructions given by the treaty of agreement; if the award was given under the influence of undue coercion; or, lastly, if one of the parties has intentionally and maliciously led the tribunal into an essential material error.[1]

[1] See above, § 16.

Award binding upon Parties only.

§ 24. The award is binding only upon the parties to the treaty of arbitration. But when there is a question of interpreting a convention to which other States than the States at variance are parties, the conflicting States have to notify to such other States the treaty of arbitration they have concluded. Each of these States has a right to intervene in the case before the tribunal, and, if one or more avail themselves of this right, the interpretation contained in the award is as binding upon them as upon the conflicting parties (article 56).

Costs of Arbitration.

§ 25. Each party pays its own expenses and an equal share of those of the tribunal (article 57).

CHAPTER II

COMPULSIVE SETTLEMENT OF STATE DIFFERENCES

I

On Compulsive Means of Settlement of State Differences in General

Lawrence, § 156—Phillimore, III. § 7—Pradier-Fodéré, VI. No. 2632—Fiore, II. No. 1225—Taylor, § 431.

Conception and kinds of Compulsive Means of Settlement.

§ 26. Compulsive means of settlement of differences are measures containing a certain amount of compulsion taken by a State for the purpose of making another State consent to such settlement of a difference as is required by the former. There are four different kinds of such means in use—namely, retorsion, reprisals (including embargo), pacific blockade, and intervention. But it must be mentioned that, whereas every amicable means of settling differences might find application in every kind of difference, not every compulsive means is applicable in every difference. For the application of retorsion is confined to political, and that of reprisals to legal differences.

Compulsive Means in contradistinction to War.

§ 27. War is very often enumerated among the compulsive means of settling international differences. This is in a sense correct, for a State might make war for no other purpose than that of compelling another State to settle a difference in the way required before war was declared. Nevertheless, the characteristics of compulsive means of

settling international differences make it a necessity to draw a sharp line between these means and war. It is, firstly, characteristic of compulsive means that, although they frequently consist of harmful measures, they are neither by the conflicting nor by other States considered as acts of war, and consequently all relations of peace, such as diplomatic and commercial intercourse, the execution of treaties, and the like, remain undisturbed. Compulsive means are in theory and practice considered peaceable, although not amicable, means of settling international differences. It is, further, characteristic of compulsive means that they are even at their worst confined to the application of certain harmful measures only, whereas belligerents in war may apply any amount and any kinds of force, with the exception only of those methods forbidden by International Law. And, thirdly, it is characteristic of compulsive means that their application must cease as soon as their purpose is realised by the compelled State declaring its readiness to settle the difference in the way requested by the compelling State; whereas, war once broken out, a belligerent is not obliged to lay down arms if and when the other belligerent is ready to comply with the request made before the war. As war is the *ultima ratio* between States, the victorious belligerent is not legally prevented from imposing upon the defeated any conditions he likes.

Compulsive Means in contradistinction to an Ultimatum and Demonstrations.

§ 28. The above-described characteristics of compulsive means for the settlement of international differences make it necessary to mention the distinction between such means and an *ultimatum*. The latter is the technical term for a written communication by one State to another which ends amicable negotiations

respecting a difference, and formulates, for the last time and categorically, the demands to be fulfilled if other measures are to be averted. An *ultimatum* is, theoretically at least, not a compulsion, although it may practically exercise the function of a compulsion, and although compulsive means, or even war, may be threatened through the same communication in the event of a refusal to comply with the demand made.[1] And the same is valid with regard to withdrawal of diplomatic agents, and to military and naval demonstrations, which some publicists[2] enumerate among the compulsive means of settlement of international differences. Although these steps may contrive, indirectly, the settlement of differences, yet they do not contain in themselves any compulsion.

II

Retorsion

Vattel, II. § 341—Hall, § 120—Phillimore, III. § 7—Twiss, II. § 10—Taylor, § 435—Wharton, III. § 318—Wheaton, § 290—Bluntschli, § 505—Heffter, § 110—Bulmerincq in Holtzendorff, IV. pp. 59-71—Ullmann, § 135—Bonfils, Nos. 972-974—Pradier-Fodéré, VI. Nos. 2634-2636—Rivier, II. § 60—Calvo, III. § 1807—Fiore, II. Nos 1226-1227—Martens, II. § 105.

Conception and Character of Retorsion.

§ 29. Retorsion is the technical term for the retaliation of discourteous or unkind or unfair and inequitable acts by acts of the same or a similar kind. Retorsion has nothing to do with international delinquencies, as it is a means of compulsion not in the case of legal differences, but only in the case of certain political differences. The act which calls for retaliation is not an illegal act; on the contrary, it is

[1] See Pradier-Fodéré, VI. No. 2649.

[2] See Taylor, §§ 431, 433, 441, and Pradier-Fodéré, VI. No. 2633.

an act that is within the competence of the doer.[1] But a State can commit many legislative, administrative, or judicial acts which, although they are not internationally illegal, contain a discourtesy or unfriendliness to another State or are unfair and inequitable. If the State against which such acts are directed considers itself wronged thereby, a political difference is created which might be settled by retorsion.

Retorsion when justified.

§ 30. The question when retorsion is and when it is not justified is not one of law, and is difficult to answer. The difficulty is created by the fact that retorsion is a means of settling such differences as are created, not by internationally illegal, but by discourteous or unfriendly or unfair and inequitable acts of one State against another, and that naturally the conceptions of discourtesy, unfriendliness, and unfairness cannot very precisely be defined. It depends, therefore, largely upon the circumstances and conditions of the special cases whether a State will or will not consider itself justified in making use of retorsion. In practice States have frequently made use of retorsion in cases of unfair treatment of their citizens abroad through rigorous passport regulations, exclusion of foreigners from certain professions, and in cases of the levy of exorbitant protectionist or fiscal duties, of refusal of the usual mutual judicial assistance, of refusal of admittance of foreign ships to harbours, and in similar cases.

[1] It is for this reason that—see Heilborn, System, p. 352, and Wagner, Zur Lehre von den Streiterledigungsmitteln des Völkerrechts (1900), pp. 53-60—it is correctly maintained that retorsion, in contradistinction to reprisals, is not of legal, but only of political importance. Nevertheless, a system of the Law of Nations must not drop the matter of retorsion altogether, because retorsion is in practice an important means of settling political differences.

§ 31. The essence of retorsion consists in retaliation for a noxious act by an act of the same kind. But a State in making use of retorsion is by no means confined to acts of the same kind as those complained of, acts of a similar kind being equally admissible. However, the acts of retorsion are confined to acts which are not internationally illegal. And, further, as retorsion is made use of only for the purpose of compelling a State to alter its discourteous, unfriendly, or unfair behaviour, all acts of retorsion ought at once to cease when such State changes its behaviour.

Retorsion how exercised.

§ 32. The value of retorsion as a means of settling certain international differences consists in its compulsory force, which has great power in regulating the intercourse of States. It is a commonplace of human nature, and by experience constantly confirmed, that evil-doers are checked by retaliation, and that those who are inclined to commit a wrong against others are often prevented by the fear of it. Through the high tide of Chauvinism, Protectionism, and unfriendly feelings against foreign nations, States are often tempted to legislative, administrative, and judicial acts against other States which, although not internationally illegal, nevertheless endanger the friendly relations and intercourse within the Family of Nations. The certainty of retaliation is the only force which can make States resist the temptation.

Value of Retorsion.

III

Reprisals

Grotius, III. c. 2—Vattel, II. §§ 342-354—Bynkershoek, Quaestiones jur. publ. I. c. 24—Hall § 120—Lawrence, §§ 157-158—Twiss, II. §§ 11-22—Taylor, §§ 436-437—Wharton, III. §§ 318-320—Wheaton, §§ 291-293—Bluntschli, §§ 500-504—Heffter, §§ 111-112—Bulmerincq in Holtzendorff, IV. pp. 72-116—Ullmann, §§ 136-137—Bonfils, Nos. 975-985—Pradier-Fodéré, VI. Nos. 2637-2647—Rivier, II. § 60—Calvo, III. §§ 1808-1831—Fiore, II. Nos. 1228-1230—Martens, II. § 105—Lafargue, "Les représailles en temps de paix" (1899)—Ducrocq, "Représailles en temps de paix" (1901), pp. 5-57, 175-232.

Conception of Reprisals in contradistinction to Retorsion.

§ 33. Reprisals is the term applied to such injurious and otherwise internationally illegal acts of a State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency. Whereas retorsion consists in retaliation of discourteous, unfriendly, unfair, and inequitable acts by acts of the same or a similar kind, and has nothing to do with international delinquencies, reprisals are otherwise illegal acts performed by a State for the purpose of obtaining justice for an international delinquency by taking the law into its own hands. It is, of course, possible that a State retaliates to an illegal act committed against itself by the performance of an act of a similar kind. Such retaliation would be a retorsion in the ordinary sense of the term, but it would not be retorsion in the technical meaning of the term as used by those writers on International Law who correctly distinguish between retorsion and reprisals.

Reprisals admissible for all International Delinquencies.

§ 34. Reprisals are admissible not only, as some writers [1] maintain, in case of denial or delay of justice or of any other internationally interdicted ill-treat-

[1] See, for instance, Twiss, II. § 19.

ment of foreign citizens, but in every case of an international delinquency for which the injured State cannot get reparation through negotiation, be it ill-treatment of its subjects abroad through denial or delay of justice or otherwise, or be it non-compliance with treaty obligations, violation of the dignity of a foreign State, violation of foreign territorial supremacy, or any other internationally illegal act. Thus Great Britain, in the case of the Sicilian Sulphur Monopoly, performed acts of reprisals against the Two Sicilies in 1840 for a violation of a treaty. By the treaty of commerce of 1816 between the Two Sicilies and Great Britain certain commercial advantages were secured to Great Britain. When, in 1838, the Neapolitan Government granted a Sulphur Monopoly to a company of French and other foreign merchants, Great Britain protested against this violation of her treaty rights, demanded the revocation of the monopoly, and, the Neapolitan Government declining to comply with this demand, laid an *embargo* on Sicilian ships in the harbour of Malta and ordered her fleet in the Mediterranean to seize Sicilian ships by way of reprisals. A number of vessels were captured, but were restored after the Sicilies had, through the mediation of France, agreed to withdraw the grant of the Sulphur Monopoly.

Reprisals admissible for International Delinquencies only.

§ 35. Reprisals are admissible for international delinquencies only and exclusively. As internationally injurious acts on the part of administrative and judicial officials, armed forces, and private individuals are not *ipso facto* international delinquencies, no reprisals are admissible for such acts in case the responsible State complies with the requirements of its vicarious responsibility.[1] Should, however, a

[1] See above, Vol. I. §§ 149 and 150.

State refuse to comply with these requirements, its vicarious responsibility would turn into original responsibility, and thereby an international delinquency would be created for which reprisals are admissible indeed.

The reprisals ordered by Great Britain in the case of Don Pacifico are an illustrative example of unjustified reprisals, because no international delinquency was committed. In 1847 a riotous mob, aided by Greek soldiers and gendarmes, broke into and plundered the house of Don Pacifico, a native of Gibraltar and an English subject living at Athens. Great Britain claimed damages from Greece without previous recourse by Don Pacifico to the Greek Courts. Greece refused to comply with the British claim, maintaining correctly that Don Pacifico ought to institute an action for damages against the rioters before the Greek Courts. Great Britain continued to press her claim, and finally in 1850 blockaded the Greek coast and ordered, by way of reprisals, the capture of Greek vessels. The conflict was eventually settled by Greece paying 150*l.* to Don Pacifico. It is generally recognised that England had no right to act as she did in this case. She could have claimed damages directly from the Greek Government only after the Greek Courts had denied satisfaction to Don Pacifico.[1]

Reprisals by whom performed.

§ 36. Acts of reprisals can nowadays be performed only by State organs such as armed forces, or men-of-war, or administrative officials, in compliance with a special order of their State. But in former times private individuals used to perform acts of reprisals. Such private acts of reprisals seem to have been in

[1] See above, Vol. I. § 167. The case is reported with all its details in Martens, Causes Célèbres, V. pp. 395-531.

vogue already in antiquity, for there existed a law in Athens according to which the relatives of an Athenian murdered abroad had, in case the foreign State refused punishment or extradition of the murderer, the right to seize and to bring before the Athenian Courts three citizens of such foreign State (so-called ἀνδροληψία). During the Middle Ages, and even in modern times to the end of the eighteenth century, States used to grant so-called "Letters of Marque" to such of their subjects as had been injured abroad either by a foreign State itself or its citizens without being able to get redress. These Letters of Marque authorised the bearer to acts of self-help against the State concerned, its citizens and their property, for the purpose of obtaining satisfaction for the wrong sustained. In later times, however, States themselves also performed acts of reprisals. Thereby acts of reprisals on the part of private individuals fell more and more into disuse, and finally disappeared totally with the end of the eighteenth century. The distinction between general and special reprisals, which used to be drawn formerly, is based on the fact that in former times a State could either authorise a single private individual to perform an act of reprisals (*special* reprisals), or command its armed forces to perform all kinds of such acts (*general* reprisals). The term "General Reprisals" is by Great Britain nowadays used for the authorisation of the British fleet to seize in time of war all enemy ships and goods. Phillimore (III. § 10) cites the following Order in Council of March 27, 1854: "Her Majesty having determined to afford active assistance to her ally, His Highness the Sultan of the Ottoman Empire, for the protection of his dominions against the encroachments and unprovoked

aggression of His Imperial Majesty the Emperor of All the Russias, Her Majesty is therefore pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, that general reprisals be granted against the ships, vessels, and goods of the Emperor of All the Russias, and of his subjects, or others inhabiting within any of his countries, territories or dominions, so that Her Majesty's fleets may lawfully seize all ships, vessels, and goods," &c.

Objects of Reprisals.

§ 37. An act of reprisal can be performed against anything and everything that belongs or is due to the delinquent State or its citizens. Ships sailing under its flag may be seized, treaties concluded with it may be suspended, a part of its territory may be militarily occupied, goods belonging to it or to its citizens may be seized, and the like. Thus in 1901 France ordered a fleet to seize the island of Mitylene as an act of reprisals against Turkey. The persons of the officials and even of the private citizens of the delinquent State are not excluded from the possible objects of reprisals. Thus, when in 1740 the Empress Anne of Russia arrested without just cause the Baron de Stackelberg, a natural-born Russian subject, who had, however, become naturalised in Prussia by entering the latter's service, Frederick II. of Prussia seized by way of reprisals two Russian subjects and detained them until Stackelberg was liberated. But it must be emphasised that the only act of reprisals admissible with regard to foreign officials or citizens is arrest; they must not be treated like criminals, but like hostages, and it is under no condition or circumstance allowed to execute them or to subject them to punishment of any kind.

The rule that anything and everything belonging to the delinquent State may be made the object of

reprisals has, however, exceptions; for instance, individuals enjoying the privilege of ex-territoriality while abroad, such as heads of States and diplomatic envoys, cannot be made the object of reprisals, although this has occasionally been done in practice.[1] In regard to another exception—namely, public debts of such State as intends performing reprisals—unanimity exists neither in theory nor in practice. When Frederick II. of Prussia in 1752, by way of negative reprisals for an alleged injustice of British Prize Courts against Prussian subjects, refused the payment of the Silesian loan due to English creditors, Great Britain maintained, apart from denying the question that there was at all a just cause for reprisals, that public debts cannot be made the object of reprisals. English jurists and others, as, for instance, Vattel (II. § 344), consent to this, but German writers dissent.[2]

Positive and Negative Reprisals.

§ 38. Reprisals may be positive or negative. One speaks of positive reprisals when such acts are performed as under ordinary circumstances would involve an international delinquency. On the other hand, negative reprisals consist of refusals to perform such acts as are under ordinary circumstances obligatory; when, for instance, the fulfilment of a treaty obligation or the payment of a debt is refused.

Reprisals must be proportionate.

§ 39. Reprisals, be they positive or negative, must be in some proportion to the wrong done and to the amount of compulsion necessary to get reparation. For instance, a State would not be justified in arresting by way of reprisals thousands of foreign subjects

[1] See the case reported in Martens, Causes Célèbres, I. p. 35.

[2] See Phillimore, III. § 22, in contradistinction to Heffter, § 111, note 5. The case is reported with all its details in Martens, Causes Célèbres, II. pp. 97–168. The dispute was settled in 1756—see below, § 437—through Great Britain paying an indemnity of 20,000*l.*

living on its territory whose home State has injured it through a denial of justice to one of its subjects living abroad. But it would in such case be justified in ordering its own Courts to deny justice to all subjects of such foreign State, or in ordering its fleet to seize several vessels sailing under the latter State's flag, or in suspending its commercial treaty with such State.

Embargo.

§ 40. A kind of reprisals, which is called *Embargo*, must be specially mentioned. This term of Spanish origin means detention, but in International Law it has the technical meaning of detention of ships in port. Now, as by way of reprisals all kinds of otherwise illegal acts may be performed, there is no doubt that ships of the delinquent State may be prevented from leaving the ports of the injured State for the purpose of compelling the delinquent State to make reparation for the wrong done.[1]

The matter need not be specially mentioned at all were it not for the fact that *embargo* by way of reprisals is to be distinguished from detention of ships for other reasons. According to a now obsolete rule of International Law, the conflicting States could, when war was breaking out or impending, lay an *embargo* on each other's vessels. Another kind of *embargo* is the so-called *arrêt de prince*—that is, a detention of foreign ships for the purpose of preventing them from spreading news of political importance. And there is, thirdly, an *embargo* arising out of the so-called *jus angariæ*—that is, the right of a belligerent State to seize and make use of neutral property in case of necessity, under the obligation to compensate the

[1] Thus in 1840—see above, §34—Great Britain laid an embargo on Sicilian ships.

neutral owner of such property. States have in the past[1] made use of this kind of *embargo* when they had not enough ships for the necessary transport of troops, ammunition, and the like.

All these kinds of international *embargo* must not be confounded with the so-called *civil embargo* of English Municipal Law[2]—namely, the order of the Sovereign to English ships not to leave English ports.

Reprisals to be preceded by Negotiations and to be stopped when Reparation is made.

§ 41. Like all the other compulsive means of settling international differences, reprisals are admissible only after negotiations have been conducted in vain for the purpose of obtaining reparation from the delinquent State. In former times, when States used to authorise private individuals to perform special reprisals, treaties of commerce and peace frequently stipulated for a certain period of time, for instance three or four months, to elapse after an application for redress before the grant of Letters of Marque by the injured State.[3] Although with the disappearance of special reprisals this is now antiquated, a reasonable time for the performance of a reparation must even nowadays be given. On the other hand, reprisals must at once cease when the delinquent State makes the necessary reparation. Individuals arrested must be set free, goods and ships seized must be handed back, occupied territory must be evacuated, suspended treaties must again be put into force, and the like.

Reprisals during Peace in contradistinction to Reprisals during War.

§ 42. Reprisals in time of peace must not be confounded with reprisals between belligerents. Whereas the former are resorted to for the purpose of settling a conflict without going to war, the latter[4] are retaliations to force an enemy guilty of a certain act of illegitimate warfare to comply with the laws of war.

[1] See below, § 364.
[2] See Phillimore, III. § 26.
[3] See Phillimore, III. § 14.
[4] See below, § 247.

Value of Reprisals.

§ 43. The value of reprisals as a means of settling international differences is analogous to the value of retorsion. States will have recourse to reprisals for such international delinquencies as they think insufficiently important for a declaration of war, but too important to be entirely overlooked. That reprisals are rather a rough means for the settlement of differences, and that the institution of reprisals may give and has in the past given occasion to abuse in case of a difference between a powerful and a weak State, cannot be denied. On the other hand, as there is no Court and no central authority above the Sovereign States which could compel a delinquent State to give reparation, the institution of reprisals can scarcely be abolished. The influence in the future of the existence of a permanent Court of Arbitration remains to be seen. If all the States would become parties to the Hague Convention for the peaceful adjustment of international differences, and if they would have recourse to the Permanent Court of Arbitration at the Hague in all cases of an alleged international delinquency which affects neither their national honour nor their independence, acts of reprisals would almost disappear.

IV

Pacific Blockade

Hall, § 121—Lawrence, § 159—Taylor, § 444—Bluntschli, §§ 506-507—Heffter, § 112—Bulmerincq in Holtzendorff, IV. pp. 116-127—Ullmann, § 138—Bonfils, Nos. 986-994—Pradier-Fodéré, V. Nos. 2483-2489, VI. No. 2648—Rivier, II. § 60—Calvo, III. §§ 1832-1859—Fiore, II. No. 1231—Martens, II. 105—Holland, Studies, pp. 151-167—Deane, "The Law of Blockade" (1870) pp. 45-48—Fauchille, "Du blocus maritime" (1882) pp. 37-67—Falcke, "Die Hauptperioden der sogenannten Friedensblockade" (1891)—Barès, "Le blocus pacifique" (1898)—Ducrocq, "Représailles en temps de paix" (1901) pp. 58-174.

Development of practice of Pacific Blockade.

§ 44. Before the nineteenth century blockade was only known as a measure between belligerents in time of war. It was not before the second quarter of the nineteenth century that the first case occurred of a so-called pacific blockade—that is, a blockade during time of peace—as a compulsive means of settling international differences; and all such cases are either cases of intervention or of reprisals.[1] The first case, one of intervention, happened in 1827, when, during the Greek insurrection, Great Britain, France, and Russia intervened in the interest of the independence of Greece and blockaded those parts of the Greek coast which were occupied by Turkish troops. Although this blockade led to the battle of Navarino, in which the Turkish fleet was destroyed, the Powers maintained, nevertheless, that they were not at war

[1] A blockade instituted by a State against such portions of its own territory as are in revolt is not a blockade for the purpose of settling international differences. It has, therefore, in itself nothing to do with the Law of Nations, but is a matter of internal police. I cannot, therefore, agree with Professor Holland, who, in his Studies in International Law, p. 138, treats it as a pacific blockade *sensu generali*. Of course, necessity of self-preservation only can justify a State that has blockaded one of its own ports in preventing the egress and ingress of *foreign* vessels. And the question might arise whether compensation is not to be paid for losses sustained by such foreign vessels.

with Turkey. In 1831, France blockaded the Tagus as an act of reprisals for the purpose of exacting redress from Portugal for injuries sustained by French subjects. Great Britain and France, exercising intervention for the purpose of making Holland consent to the independence of revolting Belgium, blockaded in 1833 the coast of Holland. In 1838, France blockaded the ports of Mexico as an act of reprisals, but Mexico declared war against France in answer to this pacific blockade. Likewise as an act of reprisals, and in the same year, France blockaded the ports of Argentina; and in 1845, conjointly with Great Britain, France blockaded the ports of Argentina a second time. In 1850, in the course of her differences with Greece on account of the case of Don Pacifico,[1] Great Britain blockaded the Greek ports, but for Greek vessels only. A case of intervention again is the pacific blockade instituted in 1860 by Sardinia, in aid of an insurrection against the then Sicilian ports of Messina and Gaeta, but the following year saw the conversion of the pacific blockade into a war blockade. In 1862 Great Britain, by way of reprisals for the plundering of a wrecked British merchantman, blockaded the Brazilian port of Rio de Janeiro. The blockade of the island of Formosa by France during her differences with China in 1884, and that of the port of Menam by France during her differences with Siam in 1893 are likewise cases of reprisals. On the other hand, cases of intervention are the blockade of the Greek coast in 1886 by Great Britain, Austria-Hungary, Germany, Italy, and Russia, for the purpose of preventing Greece from making war against Turkey; and further, the blockade of the island of Crete in 1897 by the united

[1] See above, § 35.

Powers. The last case occurred in 1902, when Great Britain, Germany, and Italy blockaded, by way of reprisals, the coast of Venezuela.[1]

Admissibility of Pacific Blockade.

§ 45. No unanimity exists between international lawyers with regard to the question whether or not pacific blockades are admissible according to the principles of the Law of Nations. There is no doubt that the theory of the Law of Nations forbids the condemnation and confiscation of vessels other than those of the blockaded State which are caught in an attempt to break a pacific blockade. For even those writers who maintain the admissibility of pacific blockade assert that such vessels cannot be confiscated. What is controverted is the question whether according to International Law the coast of a State can be blockaded at all in time of peace. From the first recorded instance to the last, several writers[2] of authority have negatived the question. On the other hand, many writers have answered the question in the affirmative, differing among themselves regarding the one point only whether or not vessels sailing under the flag of third States could be prevented from entering or leaving pacifically blockaded ports. The Institute of International Law in 1887 carefully studied, and at its meeting in Heidelberg discussed, the question, and finally voted a declaration[3] in favour of the admissibility of pacific blockades. Thus the most influential body of theorists has approved of what had been

[1] This blockade, although ostensibly a war blockade for the purpose of preventing the ingress of foreign vessels, was nevertheless essentially a pacific blockade. See Holland, in the Law Quarterly Review, XIX. (1903), p. 133; Parliamentary Papers, Venezuela, No. 1 (Venezuela), Correspondence respecting the Affairs of Venezuela.

[2] The leader of these writers is Hautefeuille, Des Droits et des Devoirs des Nations Neutres (2nd ed. 1858, pp. 272–288.)

[3] See Annuaire, IX. (1887), pp. 275-301.

established before by practice. There ought to be no doubt that the numerous cases of pacific blockade which have occurred during the nineteenth century have, through tacit consent of the members of the Family of Nations, established the admissibility of pacific blockades for the settlement of political as well as of legal international differences.

Pacific Blockade and vessels of third States.

§ 46. It has already been stated that those writers who admit the legality of pacific blockades are unanimous regarding the fact that no right exists for the blockading State to condemn and confiscate such ships of third States as try to break a pacific blockade. Apart from this, no unanimity exists with regard to the question of the relation between a pacific blockade and ships of third States. Some German writers[1] maintain that such ships have to respect the blockade, and that the blockading State has a right to stop such ships of third States as try to break a pacific blockade. The vast majority of writers, however, deny such right. There is, in fact, no rule of International Law which could establish such a right, as pacific in contradistinction to belligerent blockade is a mere matter between the conflicting parties. The declaration of the Institute of International Law in favour of pacific blockade contains, therefore, the condition: "Les navires de pavillons neutres peuvent entrer librement malgré le blocus."

The practice of pacific blockade has varied with regard to ships of third States. Before 1850 ships of third States were expected to respect pacific blockades, and such ships of these States as tried to break it were seized, but were restored at the termination of the blockade, yet without any com-

[1] See Heffter, § 112; Perels, § 30.

pensation. When in 1850 Great Britain, and likewise when in 1886 Great Britain, Austria, Germany, Italy, and Russia blockaded the Greek ports, these ports were only closed for Greek ships, and others were allowed to pass through. And the same was the case during the blockade of Crete in 1897. On the other hand, in 1894 France, during a conflict with China, blockaded the island of Formosa and tried to enforce the blockade against ships of third States. But Great Britain declared that a pacific blockade could not be enforced against ships of third States, whereupon France had to drop her intended establishment of a pacific blockade and had to consider herself at war with China. And when in 1902 Great Britain, Germany, and Italy instituted a blockade against Venezuela, they declared it a war blockade [1] because they intended to enforce it against vessels of third States.

Pacific Blockade and vessels of the blockaded State.

§ 47. Theory and practice seem nowadays to agree upon the rule that the ships of a pacifically blockaded State trying to break the blockade may be seized and sequestrated. But they cannot be condemned and confiscated, as they have to be restored at the termination of the blockade. Thus, although the Powers which had instituted a blockade against Venezuela in 1902 declared it a war blockade, all Venezuelan public and private ships seized were restored after the blockade was raised.

Manner of Pacific Blockade.

§ 48. Pacific blockade is a measure of such enormous consequences that it can be justified only after the failure of preceding negotiations for the purpose of settling the questions in dispute. And further, as blockade, being a violation of the territorial supremacy

[1] That this blockade was essentially a pacific blockade I have already stated above, p. 45, note 1.

of the blockaded State, is *prima facie* of a hostile character, it is necessary for such State as intends in time of peace to blockade another to notify its intention to the latter and to fix the day and hour for the establishment of the blockade. And, thirdly, although the Declaration of Paris of 1856 enacting that a blockade to be binding must be effective concerns blockades in time of war only, there can be no doubt that pacific blockades ought to be likewise effective. The declaration of the Institute of International Law in favour of pacific blockade contains, therefore, the condition: "Le blocus pacifique doit être déclaré et notifié officiellement, et maintenu par une force suffisante."

Value of Pacific Blockade.

§ 49. As the establishment of a pacific blockade has in various instances not prevented the outbreak of hostilities, the value of a pacific blockade as a means of non-hostile settlement of international differences is doubted and considered precarious by many writers. But others agree, and I think they are right, that the institution of pacific blockade is of great value, be it as an act of reprisals or of intervention. Every measure which is suitable and calculated to prevent the outbreak of war must be welcomed, and experience shows that pacific blockade is, although not universally successful, a measure of such kind. That it may give, and has in the past given, occasion for abuse in case of a difference between a strong and a weak Power is no argument against it, as the same is valid with regard to reprisals and intervention in general, and even to war. And although it is naturally a measure which will scarcely be made use of in case of a difference between two powerful naval States, it might nevertheless find application with success against a powerful naval

State if exercised by the united navies of several Powers.[1]

V

Intervention

See the literature quoted above in Vol. I. at the commencement of § 134.

Intervention in contradistinction to Participation in a difference.

§ 50. Intervention as a means of settling international differences is only a special kind of intervention in general, which has already been discussed.[2] It consists in the dictatorial interference of a third State in a difference between two States for the purpose of settling the difference in the way demanded by the intervening State. This dictatorial interference takes place for the purpose of exercising a compulsion upon one or both of the parties in conflict, and must be distinguished from such attitude of a State as makes it a party to the very conflict. If two States are in conflict and a third State joins one of them out of friendship or from any other motive, such third State does not exercise an intervention as a means of settling international differences, but it becomes a party to the conflict. If, for instance, an alliance exists between one of two States in conflict and a third, and if eventually, as war has broken out in consequence of the conflict, such third State comes to the help of

[1] The following is the full text of the declaration of the Institute of International Law referred to above, § 45:

"L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit de gens que sous les conditions suivantes:

"1. Les navires de pavillon étranger peuvent entrer librement malgré le blocus.

"2. Le blocus pacifique doit être déclaré et notifié officiellement et maintenu par une force suffisante.

"3. Les navires de la puissance bloquée qui ne respectent pas un pareil blocus, peuvent être séquestrés. Le blocus ayant cessé, ils doivent être restitués avec leurs cargaisons à leurs propriétaires, mais sans dédommagement à aucun titre."

[2] See above, Vol. I. §§ 134–138.

its ally, no intervention in the technical sense of the term takes place. A State intervening in a dispute between two other States does not become a party to their dispute, but is the author of a new imbroglio, because such third State dictatorially requests those other States to settle their difference in a way to which both, or at least one of them, objects. An intervention, for instance, takes place when, although two States in conflict have made up their minds to fight it out in war, a third State dictatorially requests them to settle their dispute through arbitration.

Intervention, in the form of dictatorial interference, must, further, be distinguished from such efforts of a State as are directed to induce the States in conflict to settle their difference amicably by proffering its good offices or mediation, or by giving friendly advice. It is, therefore, incorrect when some jurists [1] speak of good offices and the like as an "amicable" in contradistinction to a "hostile" intervention.

Mode of Intervention.

§ 51. Intervention in a difference between two other States is exercised through a communication of the intervening State to one or both of the conflicting States with a dictatorial request for the settlement of the conflict in a certain way, for instance by arbitration or by the acceptance of certain terms. An intervention can take place either on the part of one State alone or of several States collectively. If the parties comply with the request of the intervening State or States, the intervention is terminated. If, however, one or both of the parties do not comply with the request, the intervening State will either withdraw its intervention or proceed to the performance of acts more stringent than a mere request, such as pacific blockade, military occupation, and the like. Even

[1] Thus, for instance, Rivier, II. § 58. See also above, Vol. I. § 134.

war may be declared for the purpose of an intervention. Of special importance are the collective interventions exercised by several great Powers in the interest of the balance of power and of humanity.[1]

Time of Intervention.

§ 52. An intervention in a difference between two States can take place at any time from the moment a conflict arises till the moment it is settled, and even immediately after the settlement. In many cases interventions have taken place before the outbreak of war between two States for the purpose of preventing war; in other cases third States have intervened during a war which had broken out in consequence of a conflict. Interventions have, further, taken place immediately after the peaceable settlement of a difference, or after the termination of war by a treaty of peace or by conquest, on the grounds that the conditions of the settlement or the treaty of peace were against the interests of the intervening State, or because the latter would not consent to the annexation of the conquered State by the victor.[2]

[1] See above, Vol. I. §§ 136 and 137.

[2] With regard to the question of the right of intervention, the admissibility of intervention in default of a right, and to all other details concerning intervention, the reader must be referred above, Vol. I. §§ 135–138.

PART II

WAR

CHAPTER I

ON WAR IN GENERAL

I

Characteristics of War

Grotius, I. c. 1, § 2—Vattel, III. §§ 1-4, 69-72—Hall, §§ 15-18—Lawrence, § 155—Lorimer, II. pp. 18-28—Manning, pp. 131-133—Phillimore, III. § 49—Twiss, II. § 22-29—Taylor, §§ 449-451—Wheaton, § 295—Bluntschli, §§ 510-514—Heffter, §§ 113-114—Lueder in Holtzendorff, IV. pp. 175-198—Klüber, §§ 235-237—G. F. Martens, II. § 263—Ullmann, § 141—Bonfils, Nos. 1000-1001—Pradier-Fodéré, VI. Nos. 2650-2660—Rivier, II. § 61—Calvo, IV. §§ 1860-1864—Fiore, III. Nos. 1232-1268—Martens, II. § 106—Westlake, Chapters, pp. 258-264—Heilborn, System, pp. 321-332—Rettich, "Zur Theorie und Geschichte des Rechts zum Kriege" (1888), pp. 3-140—Wiesse, "Le Droit international appliqué aux guerres civiles" (1898)—Rougier, "Les guerres civiles et le droit des gens" (1903).

War no illegality.

§ 53. As within the boundaries of the modern State an armed contention between two or more citizens is illegal, public opinion has become convinced that armed contests between citizens are inconsistent with Municipal Law. Influenced by this fact, fanatics of international peace, as well as those innumerable individuals who cannot grasp the idea of a law between Sovereign States, frequently consider war and law inconsistent. They quote the fact that wars are frequently waged by States as a proof against the very existence of an International Law. It is not difficult to show the absurdity of this opinion. As States are Sovereign, and as consequently no

central authority can exist above them able to enforce compliance with its demands, war cannot always be avoided. International Law recognises this fact, but at the same time provides regulations with which the belligerents have to comply. Although with the outbreak of war all peaceable relations between the belligerents cease, there remain certain mutual legal obligations and duties. Thus war is not inconsistent with, but a condition regulated by, International Law. The latter cannot and does not object to the States which are in conflict waging war upon each other instead of peaceably settling their difference. But if they choose to go to war they have to comply with the rules laid down by International Law regarding the conduct of war and the relations between the belligerents and neutral States. That International Law, if it could forbid war altogether, would be a more perfect law than it is at present there is no doubt. Yet eternal peace is an impossibility in the conditions and circumstances under which mankind live and perhaps will have to live for ever, although eternal peace is certainly an ideal of civilisation.

Conception of War.

§ 54. War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases. War is a fact recognised, and with regard to many points regulated, but not established, by International Law. Those writers[1] who define war as the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, forget that wars have often been waged by both parties for political reasons only; they con-

[1] See, for instance, Vattel, III. II. 26; Bluntschli, § 510; Bulmerincq, § 92. § 1; Phillimore, III. § 49; Twiss,

found a possible but not at all necessary cause of war with the conception of war. A State may be driven into war because it cannot otherwise get reparation for an international delinquency, and such State may then maintain that it exercises by the war nothing else than legally recognised self-help. But when States are driven into or deliberately wage war for political reasons, no legally recognised act of self-help is in such case performed by the war. And the same laws of war are valid, whether wars are waged on account of legal or of political differences.

War a contention.

§ 55. In any case, it is universally recognised that war is a *contention*, which means, *a violent struggle through the application of armed force.* For a war to be in existence, two or more States must actually have their armed forces fighting against each other, although the commencement of a war may date back to its declaration or some other unilateral initiative act. Unilateral acts of force performed by one State against another may be a cause of the outbreak of war, but are not war in themselves, as long as they are not answered by similar hostile acts by the other side, or at least by a declaration of the other side that it considers the particular acts as acts of war. Thus it comes about that acts of force performed by one State against another by way of reprisals or during a pacific blockade in the case of an intervention are not necessarily initiative acts of war. And even acts of force illegally performed by one State against another, such, for instance, as occupation of a part of its territory, are not acts of war as long as they are not met with acts of force from the other side, or at least with a declaration from the latter that it considers the particular acts as acts of war. Thus, when Louis XIV. of France, after

the Peace of Nimeguen, instituted the so-called Chambers of Reunion and in 1680 and 1681 seized the territory of the then Free Town of Strassburg and other parts of the German Empire without the latter's offering armed resistance, these acts of force, although doubtless illegal, were not acts of war.

War a contention between States.

§ 56. To be considered war, the contention must be going on *between States*. In the Middle Ages wars were known between private individuals, so-called private wars, and wars between corporations, as the Hansa for instance, and between States. But such wars have totally disappeared in modern times. It may, of course, happen that a contention arises between the armed forces of a State and a body of armed individuals, but such contention[1] is not war. Thus the contention between the Raiders under Dr. Jameson and the former South African Republic in January 1896 was not war. Nor is a contention with insurgents or with pirates a war. And a so-called civil war[2] need not be from the beginning nor become at all a war in the technical sense of the term according to International Law. On the other hand, to an armed contention between a suzerain and its vassal[3] State the character of war ought not to be denied, for both parties are States, although the fact that the vassal makes war against the suzerain may, from the standpoint of Constitutional Law, be considered rebellion. And likewise an armed contention between a full Sovereign State and a State under the suzerainty of another State, as, for instance, the contention between Servia and Bulgaria in 1885, is war.

[1] Some publicists maintain, however, that a contention between a State and the armed forces of a party fighting for public rights must be considered as war. See, for instance, Bluntschli, § 113, and Fiore, III. § 1265.

[2] See below, § 59.

[3] See below, § 75.

Again, an armed contention between one or more member-States of a Federal State and the latter ought to be considered as war in the technical sense of the term, according to International Law, although, according to the constitution of Federal States, war between the member-States as well as between any member-State and the Federal State itself is illegal, and the recourse to arms by a member-State may therefore correctly, from the standpoint of the constitution, be called a rebellion. Thus the War of Secession within the United States between the Northern and the Southern member-States in 1861–1865 was real war.

War a contention between States through armed forces.

§ 57. It must be emphasised that war nowadays is a contention of States *through their armed forces.* Those private subjects of the belligerents who do not directly or indirectly belong to the armed forces do not take part in the armed contention : they do not attack and defend, and no attack is therefore made upon them. This fact is the result of an evolution of practices which were totally different in former times. During antiquity and the greater part of the Middle Ages war was a contention between the whole of the populations of the belligerent States. In time of war every subject of one belligerent, whether an armed and fighting individual or not, whether man or woman, adult or infant, could be killed or enslaved by the other belligerent at will. But gradually a milder and more discriminative practice grew up, and nowadays the life and liberty of such private subjects of belligerents as do not directly or indirectly belong to their armed forces are safe, as is also, with certain exceptions, their private property.

This is a generally admitted fact. But opinions disagree as to the general position of such private

subjects in time of war. The majority of the European continental writers for the last two generations have propagated the doctrine that no relation of enmity exists between belligerents and such private subjects, or between the private subjects of both belligerents. This doctrine goes back to Rousseau, "Contrat Social," I. c. 4. In 1801, on the occasion of the opening of the French Prize Court, the celebrated lawyer and statesman Portalis adopted Rousseau's doctrine by declaring that war is a relation between States and not between individuals, and that consequently the subjects of the belligerents are only enemies as soldiers, not as citizens. And although this new doctrine did not, as Hall (§ 18) shows, spread at once, it has since the second half of the nineteenth century been proclaimed on the European continent by the majority of writers. English and American-English writers have, however, never adopted this doctrine, but have always maintained that the relation of enmity between the belligerents extends also to their private citizens.

I think, if the facts of war are taken into consideration without prejudice, there ought to be no doubt that the Anglo-American view is correct. It is impossible to sever the citizens from their State, and the outbreak of war between two States cannot but make their citizens enemies. But, on the other hand, the whole controversy is unworthy of dispute, because it is only a terminological controversy without any material consequences. For, apart from the terminology, the parties agree in substance upon the rules of the Law of Nations regarding such private subjects as do not directly or indirectly belong to the armed forces. Nobody doubts that such private individuals are safe as regards their life and liberty, provided

they behave peacefully and loyally, and that, with certain exceptions, their private property must not be touched. On the other hand, nobody doubts that, according to a generally recognised custom of modern warfare, the belligerent who has occupied a part or the whole of his opponent's territory, and who treats such private individuals leniently according to the rule of International Law, can punish them for any hostile act, since they do not enjoy the privileges of members of armed forces. Although, on the one hand, International Law does by no means forbid, and, as a law between States, is not competent to forbid, private individuals to take up arms against an enemy, it gives, on the other hand, the right to the enemy to treat hostilities committed by private [1] individuals as acts of illegitimate warfare. A belligerent is under a duty to respect the life and liberty of private enemy individuals, but he can carry out this duty under the condition only that these private individuals abstain from hostilities against himself. Through military occupation in war such private individuals fall under the territorial supremacy of the belligerent, and he can therefore demand that they comply with his orders regarding the safety of his forces. The position of private enemy individuals is made known to them through the proclamations which the commanders-in-chief of an army occupying the territory usually publish. Thus General Sir Redvers Buller, when entering the territory of the South African Republic in 1900, published the following proclamation:

"The troops of Queen Victoria are now passing through the Transvaal. Her Majesty does not make war on individuals, but is, on the contrary, anxious

[1] See below, § 254.

to spare them as far as may be possible the horrors of war. The quarrel England has is with the Government, not with the people, of the Transvaal. Provided they remain neutral, no attempt will be made to interfere with persons living near the line of march; every possible protection will be given them, and any of their property that it may be necessary to take will be paid for. But, on the other hand, those who are thus allowed to remain near the line of march must respect and maintain their neutrality, and the residents of any locality will be held responsible, both in their persons and property, if any damage is done to railway or telegraph, or any violence done to any member of the British forces in the vicinity of their home."

It must be emphasised that this position of private individuals of the hostile States renders it inevitable that commanders of armies which have occupied hostile territory should consider and mark as criminals all such private individuals of the enemy as commit hostile acts, although such individuals may act from patriotic motives and may be highly praised for their acts by their compatriots. The high-sounding and well-meant words of Baron Lambermont, one of the Belgian delegates at the Conference of Brussels of 1874—"Il y a des choses qui se font à la guerre, qui se feront toujours, et que l'on doit bien accepter. Mais il s'agit ici de les convertir en lois, en prescriptions positives et internationales. Si les citoyens doivent être conduits au supplice pour avoir tenté de défendre leur pays au péril de leur vie, il ne faut pas qu'ils trouvent inscrits sur le poteau au pied duquel ils seront fusilés l'article d'un traité signé par leur propre gouvernement qui d'avance les condamnait à mort"—have no *raison d'être* in face of the fact that

according to a generally recognised customary rule of International Law hostile acts on the part of private individuals are not acts of legitimate warfare, and the offenders can be treated and punished as war-criminals. Even those writers[1] who object to the term "criminals" do not deny that such hostile acts by private individuals, in contradistinction to hostile acts by members of the armed forces, may be severely punished. The controversy whether or not such acts may be styled "crimes" is again only one of terminology; materially the rule is not at all controverted.[2]

[1] See, for instance, Hall, § 18, p. 74, and Westlake, Chapters, p. 262.

[2] It is of value to quote articles 20–26 of the "Instructions for the Government of Armies of the United States in the Field," which the War Department of the United States published in 1863 during the War of Secession with the Southern member-States:

(20) "Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civil existence that men live in political, continuous societies, forming organised units, called States or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war."

(21) "The citizen or native of a hostile country is thus an enemy as one of the constituents of the hostile State or nation, and as such is subjected to the hardships of war."

(22) "Nevertheless, as civilisation has advanced during the last centuries, so has likewise advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit."

(23) "Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."

(24) "The almost universal rule in remote times was . . . that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was . . . the exception."

(25) "In modern regular wars . . . protection of the inoffensive citizens of the hostile country is the rule; privation and disturbance of private relations are the exceptions."

(26) "Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious Government or rulers, and they may expel every one who declines to do so. But, whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives."

War a contention between States for the purpose of overpowering each other.

§ 58. The last, and not the least important, characteristic of war is its purpose. It is a contention between States for the purpose of overpowering each other. This purpose of war is not to be confounded with the ends[1] of war, for, whatever the ends of war may be, they can only be realised by one belligerent overpowering the other. Such a defeat as compels the vanquished to comply with any demand the victor may choose to make is the purpose of war. Therefore war calls into existence the display of the greatest possible power and force on the part of the belligerents, rouses the passion of the nations in conflict to the highest possible degree, and endangers the welfare, the honour, and eventually the very existence of both belligerents. Nobody can predict with certainty the result of a war, however insignificant one side may seem to be. Every war is a risk and a venture. Every State which goes to war knows beforehand what is at stake, and it would never go to war were it not for its firm, though very often illusory, conviction of its superiority in strength over its opponent. Victory is necessary in order to overpower the enemy; and it is this necessity which justifies all the indescribable horrors of war, the enormous sacrifice of human life and health, and the unavoidable destruction of property and devastation of territory. Apart from special restrictions imposed by the Law of Nations upon belligerents, all kinds and all degrees of force may be, and eventually must be, made use of in war in the interest and under the compulsion of its purpose and in spite of their cruelty and the utter misery they entail. As war is a struggle for existence between States, no amount of individual suffering and misery can be regarded; the national existence and

[1] See below, § 66.

independence of the struggling State is a higher consideration than any individual well-being.

Civil War.

§ 59. The characteristics of war as developed above must help to decide the question whether so-called civil wars are war in the technical meaning of the term. It has already been stated above (in § 56) that an armed contention between member-States of a Federal State and the latter and between a suzerain and its vassal ought to be considered as war because both parties are real States, although the Federal State as well as the suzerain may correctly designate it as a rebellion. Such armed contentions may be called civil wars in a wider sense of the term. In the proper sense of the term a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large fraction of the population of a State rises in arms against the legitimate Government. As war is an armed contention between *States*, such a civil war need not be from the beginning, nor become at all, war in the technical sense of the term. But it may become war through the recognition of each of the contending parties or of the insurgents, as the case may be, as a belligerent Power.[1] Through this recognition a body of individuals receives in so far an international position as it is for some parts and in some points treated as though it were a subject[2] of International Law. Such recognition may be granted by the very State within the boundaries of which the civil war broke out, and then other States will likewise in most cases, although they need not, recognise a state of war as existing and bear the duties of neutrality. But it may happen that other States recognise insurgents as a belligerent

[1] See below, §§ 76 and 298.

[2] See above, Vol. I. § 63.

Power before the State on whose territory the insurrection broke out so recognises them. In such case the insurrection is war in the eyes of these other States, but not in the eyes of the legitimate Government.[1] Be that as it may, it must be specially observed that, although a civil war becomes war in the technical sense of the term by recognition, this recognition has a lasting effect only when the insurgents succeed in getting their independence established through the defeat of the legitimate Government and a consequent treaty of peace which recognises their independence. Nothing, however, prevents the State concerned, after the defeat of the insurgents and reconquest of the territory which they had occupied, from treating them as rebels according to the Criminal Law of the land, for the character of a belligerent Power received through recognition is lost *ipso facto* by their defeat and the re-occupation by the legitimate Government of the territory occupied by them.

Guerilla War.

§ 60. The characteristics of war as developed above are also decisive for the answer to the question whether so-called guerilla war is real war in the technical sense of the term. Such guerilla war must not be confounded with guerilla tactics during a war. It happens during war that the commanders send small bodies of soldiers wearing their uniform to the rear of the enemy for the purpose of destroying bridges and railways, cutting off communications and supplies, attacking convoys, intercepting despatches, and the like. This is in every way legal, and the members of such bodies, when captured, enjoy the treatment due to enemy soldiers. It happens, further, that hitherto private individuals who did not

[1] See below, § 298.

take part in the armed contention take up arms and devote themselves mainly to similar tactics. According to the former rules of International Law such individuals, when captured, under no condition enjoyed the treatment due to enemy soldiers, but could be treated as criminals and punished with death. According to article 1 of the Regulations adopted in 1899 by the Hague Conference, such guerilla fighters enjoy the treatment of soldiers under the four conditions that they (1) do not act individually, but form a body commanded by a person responsible for his subordinates, (2) have a fixed distinctive emblem recognisable at a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws of war.

On the other hand, one speaks of guerilla war or petty war when, after the defeat and the capture of the main part of the enemy forces, the occupation of the enemy territory, and the downfall of the enemy Government, the routed remnants of the defeated army carry on the contention by mere guerilla tactics. Although hopeless of success in the end, such petty war can go on for a long time, thus preventing the establishment of a state of peace in spite of the fact that regular war is over and the task of the army of occupation is no longer regular warfare. Now the question whether such guerilla war is real war in the strict sense of the term in International Law must, I think, be answered in the negative, for two reasons. First, there are no longer the forces of two States in the field, because the defeated belligerent State has ceased to exist through the military occupation of its territory, the downfall of its established Government, the capture of the main part and the routing of the remnant of its forces. And, secondly, there is no

longer a contention between armed forces in progress. For although the guerilla bands are still fighting when attacked, or when attacking small bodies of enemy soldiers, they try to avoid a pitched battle, and content themselves with the constant harassing of the victorious army, the destroying of bridges and railways, cutting off communications and supplies, attacking convoys, and the like, always in the hope that some event or events may occur which will induce the victorious army to withdraw from the conquered territory. But if guerilla war is not real war, it is obvious that in strict law the victor need no longer treat the guerilla bands as a belligerent Power and the captured members of those bands as soldiers. It is, however, not advisable that the victor should cease such treatment as long as those bands are under responsible commanders and observe themselves the laws and usages of war. For I can see no advantage or reason why, although in strict law it could be done, those bands should be treated as criminals. Such treatment would only call for acts of revenge on their part, without in the least accelerating the pacification of the country. And it is, after all, to be taken into consideration that these bands act not out of criminal but patriotic motives. With patience and firmness the victor will succeed in pacifying these bands without recourse to methods of harshness.

II

Causes, Kinds, and Ends of War

Grotius, I. c. 3; II. c. 1; III. c. 3—Pufendorf, VIII. c. 6, § 9—Vattel, III. §§ 2, 5, 24-50, 183-187—Lorimer, II. pp. 29-48—Phillimore, III. §§ 33-48—Twiss, II. §§ 26-30—Halleck, I. pp. 488-519—Taylor, §§ 452-454—Wheaton, §§ 295-296—Bluntschli, §§ 515-521—Heffter, § 113—Lueder in Holtzendorff, IV. pp. 221-236—Klüber, §§ 41, 235, 237—G. F. Martens, §§ 265-266—Ullmann, § 141—Bonfils, Nos. 1002-1005—Pradier-Fodéré, VI. Nos. 2661-2670—Rivier, II. p. 219—Calvo, IV. §§ 1866-1896—Fichte, "Ueber den Begriff des wahrhaften Krieges" (1815)—Rettich, "Zur Theorie und Geschichte des Rechts zum Kriege" (1888), pp. 141-292—Peyronnard, "Des causes de la guerre" (1901).

Rules of Warfare independent of Causes of War.

§ 61. Whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and the neutral States. This being the case, the question as to the causes of war is of minor importance for the Law of Nations, although not for international ethics. The matter need not be discussed at all in a treatise on International Law were it not for the fact that many writers maintain that there are rules of International Law in existence which determine and define just causes of war. It must, however, be emphasised that this is by no means the case. All such rules laid down by writers on International Law as recognise certain causes as just and others as unjust are rules of writers, but not rules of International Law based on international custom or international treaties.

Causes of War.

§ 62. The causes of war are innumerable. They are involved in the fact that the development of

mankind is indissolubly connected with the national development of States. The millions of individuals who as a body are called mankind do not face one another individually and severally, but in groups as races, nations, and States. With the welfare of the races, nations, and States to which they belong the welfare of individuals is more or less identified. And it is the development of races, nations, and States that carries with it the causes of war. A constant increase of population must in the end enforce the necessity upon a State of acquiring more territory, and if such territory cannot be acquired by peaceable means, acquisition by conquest alone remains. At certain periods of history the principle of nationality and the desire for national unity gain such a power over the hearts and minds of the individuals belonging to the same race or nation, but living within the boundaries of several different States, that wars break out for the cause of national unity and independence. And jealous rivalry between two or more States, the awakening of national ambition, the craving for rich colonies, the desire of a land-locked State for a sea coast, the endeavour of a hitherto minor State to become a world-Power, the ambition of dynasties or of great politicians to extend and enlarge their influence beyond the boundaries of their own State, and innumerable other factors, have been at work as far back as history goes, and will probably be at work for all the future, to create causes of war.

Just Causes of War.

§ 63. Now it depends often largely upon the standpoint from which they are viewed whether or not causes of war are to be called just causes. A war may be just or unjust from the standpoint of both belligerents, or just from the standpoint of one and utterly unjust from the standpoint of the

other. The assertion that whereas all wars waged for political causes are unjust, all wars waged for international delinquencies are just, if there be no other way of getting reparation and satisfaction, is certainly incorrect in its generality. The evils of war are so great that, even when caused by an international delinquency,[1] war cannot be justified if the delinquency was comparatively unimportant and trifling. And, on the other hand, under certain circumstances and conditions many political causes of war may correctly be called just causes. Only such individuals as lack insight into history and human nature can, for instance, defend the opinion that a war is unjust which has been caused by the desire for national unity or by the desire to maintain the balance of power which is the basis of all International Law. The necessity of a war implies its justification, whatever may be the cause. In the past many wars have undoubtedly been waged which were unjust from whatever standpoint they may be viewed. But the number of wars diminishes gradually every year, and the majority of the European wars during the nineteenth century were wars that were, from the standpoint of at least one of the belligerents, necessary and therefore just wars.

Causes in contradistinction to Pretexts for War.

§ 64. Be that as it may, causes of war must not be confounded with pretexts for war. A State which makes war against another will never confess that there is no just cause for war, and it will therefore, when it has made up its mind to make war for political reasons, always look out for a so-called just cause. Thus frequently the apparent reason of a war is only a pretext behind which the real cause is concealed. If two States are convinced that war between them is

[1] See above, Vol. I. §§ 151–156.

inevitable, and if consequently they face each other armed to the teeth, they will find at the suitable time many a so-called just cause plausible and calculated to serve as a pretext for the outbreak of the war which was planned and resolved upon long ago. The skill of politics and diplomacy are nowhere more needed than on the occasion of a State's conviction that it must go to war for one reason or another. Public opinion at home and abroad is often not ripe to appreciate the reason and not prepared for the scheme of the leading politicians, whose task it is to realise their plans with the aid of pretexts which appear as the cause of war, whereas the real cause does not become apparent for some time.

Different kinds of War.

§ 65. Such writers on International Law as lay great stress upon the causes of war in general and upon the distinction between just causes and others, lay also great stress upon the distinction between different kinds of war. But as the rules of the Law of Nations are the same [1] for the different kinds of war that may be distinguished, this distinction is in most cases of no importance. Apart from that, there is no unanimity respecting the kinds of war, and it is apparent that, just as the causes of war are innumerable, so innumerable kinds of war can be distinguished. Thus one speaks of offensive and defensive, of religious, political, dynastic, national, civil wars; of wars of unity, independence, conquest, intervention, revenge, and of many other kinds. As the very name which each different kind of war bears explains always its character, no further details are necessary respecting kinds of war.

Ends of War.

§ 66. The cause or causes of a war determine at its inception the ends of such war. The ends of war

[1] See above, § 61.

must not be confounded with the purpose of war.[1] Whereas the purpose of war is always the same—namely, the overpowering and utter defeat of the opponent—the ends of war may be different in each case. Ends of war are those objects for the realisation of which a war is made.[2] In the beginning of the war its ends are determined by its cause or causes, as already said. But these ends may undergo an alteration, or at least a modification, with the progress and the development of the war. No moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was made. If war has once broken out the very national existence of the belligerents is more or less at stake. The risk the belligerents run, the exertion they make, the blood and wealth they sacrifice, the reputation they gain or lose through the changing fortune and chances of war—all these and many other factors work or may work together to influence the ends of a war so that eventually there is scarcely any longer a relation between them and the causes of the war. If war really were, as some writers maintain,[3] the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, no such alteration of the ends of war could take place without setting at once in the wrong such belligerent as changes the ends for which the war was initiated. But history shows that nothing of the kind is really the case, and the rules of International Law by no means forbid such alteration or modification of the ends of a war. This alteration or modification of the ends is the result of

[1] Ends of war must likewise not be confounded with aims of land and sea warfare; see below, §§ 103 and 173.

[2] See Bluntschli, § 536; Lueder in Holtzendorff, IV. p. 364; Rivier, II. p. 219.

[3] See above, § 54.

an alteration or modification of circumstances created during the progress of war through the factors previously mentioned; it could not be otherwise, and there is no moral, legal, or political reason why it should be otherwise. And the natural jealousy between the members of the Family of Nations, their conflicting interests in many points, and the necessity of a balance of power, are factors of sufficient strength to check the dangers which such alteration of the ends of a war may eventually involve.

III

The Laws of War

Hall, § 17—Westlake, Chapters, pp. 232-235—Maine, pp. 122-159—Phillimore, III. § 50—Taylor, § 470—Walker, History, I. §§ 106-108—Heffter, § 119—Lueder in Holtzendorff, IV. pp. 253-333—Ullmann, §§ 142 and 144—Bonfils, Nos. 1006-1012—Rivier, II. pp. 238-242—Calvo, IV. §§ 1897-1898—Fiore, III. Nos. 1244-1260—Martens, II. § 107—Longuet, p. 12—Kriegsgebrauch, p. 2—Holland, Studies, pp. 40-96.

Origin of the Laws of War.

§ 67. Laws of War are the rules of the Law of Nations respecting warfare. The roots of the present Laws of War are to be traced back to practices of belligerents which arose and grew gradually during the latter part of the Middle Ages. The unsparing cruelty of the war practices during the greater part of the Middle Ages began gradually to be modified through the influence of Christianity and chivalry. And although these practices were cruel enough during the fifteenth, sixteenth, and seventeenth centuries, they were mild compared with those of still earlier times. A decided progress was made during the eighteenth, and again during the nineteenth century after the close of the Napoleonic wars, especially in the time

from 1850 to 1900. The laws of war evolved in this way: isolated milder practices became by-and-by usages, so-called *usus in bello*, manner of warfare, *Kriegs-Manier*, and these usages through custom and treaties turned into legal rules. And this evolution is constantly going on, for, besides the recognised Laws of War, there are usages in existence which have a tendency to become gradually legal rules of warfare. The whole growth of the laws and usages of war is determined by three principles. There is, first, the principle that a belligerent should be justified in applying any amount and any kind of force which is necessary for the realisation of the purpose of war—namely, the overpowering of the opponent. There is, secondly, the principle of humanity at work, which says that all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted to a belligerent. And, thirdly and lastly, there is at work the principle of chivalry which arose in the Middle Ages and introduced a certain amount of fairness in offence and defence, and a certain mutual respect. And, in contradistinction to the savage cruelty of former times, belligerents have in modern times come to the conviction that the realisation of the purpose of war is in no way hampered by indulgence shown to the wounded, the prisoners, and the private individuals who do not take part in the fighting. Thus the influence of the principle of humanity has been and is still enormous upon the practice of warfare. And the methods of warfare, although by the nature of war to a certain degree cruel and unsparing, become less cruel and more humane every day. But it must be emphasised that the whole evolution of the laws and usages of war could not have taken place but for the

institution of standing armies, which dates from the fifteenth century. The humanising of the practices of war would have been impossible without the discipline of standing armies; and the important distinction between members of armed forces and private individuals could not have arisen without the existence of standing armies.

The latest Development of the Laws of War.

§ 68. The second part of the nineteenth century has produced the latest and the most important development of the Laws of War through general treaties between the majority of States.

The first treaty of that kind was the Declaration of Paris of April 16, 1856, respecting warfare on sea. It abolishes privateering, recognises the principles that the neutral flag covers enemy goods and that neutral goods under an enemy flag cannot be seized, and enacts the rule that a blockade in order to be binding must be effective.

The next treaty was the Geneva Convention of August 22, 1864, for the amelioration of the condition of the wounded soldiers in armies in the field, and now joined by nearly all the civilised States. The Hague Conference of 1899 has agreed upon a Convention for the adaptation of the principles of the Geneva Convention to maritime warfare.

The third treaty was the Declaration of St. Petersburg of December 11, 1868, respecting the prohibition of the use in war of explosive balls under a certain weight.

The fourth and last treaty was the Convention enacting the "Regulations respecting the Laws and Customs of War on Land" agreed upon at the Hague Conference in 1899. The history of this Convention may be traced back to the "Instructions for the Government of Armies of the United States in the Field" which the United States published on April 14,

1863, during the War of Secession. These instructions, which were drafted by Professor Francis Lieber, of the Columbia College of New York, represent the first endeavour to codify the Laws of War, and they are even nowadays of great value and importance. In 1874 an International Conference, invited by the Emperor Alexander II. of Russia, met at Brussels for the purpose of discussing a draft code of the Laws of War on land as prepared by Russia. The body of the articles agreed upon at this Conference, and known as the "Brussels Declarations," have, however, never become law, as ratification was never given by the Powers. But the Brussels Declarations were made the basis of deliberations on the part of the Institute of International Law, which at its meeting at Oxford in 1880 adopted a Manual [1] of the Laws of War consisting of a body of 86 Rules under the title "Les Lois de la Guerre sur Terre," and a copy of this draft code was sent to all the Governments of Europe and America. It was, however, not until the Hague Peace Conference of 1899 that the Powers reassembled to discuss again the codification of the Laws of War. At this Conference the Brussels Declarations were taken as the basis of the deliberations; but although the bulk of its articles was taken over, several important modifications were introduced in the Convention, which was finally agreed upon and ratified, only a few Powers abstaining from ratification. The Convention,[2] as the

[1] See Annuaire, V. pp. 157–174.

[2] For brevity's sake the Hague Convention enacting Regulations regarding the laws and customs of war on land will be referred to in the following pages as the *Hague Regulations*. It is, however, of importance to observe that the Hague Regulations, although they are intended to be binding upon the belligerents, are only the basis upon which the signatory Powers have to frame instructions for their forces. Article 1 declares: "The high contracting parties shall issue instructions to their armed land forces, which shall be in conformity with the Regulations respecting

preamble expressly states, does not aim at giving a complete code of the Laws of War on land, and cases beyond its scope still remain the subject of customary rules and usages. Further, it does not create universal International Law, as article 2 of the Convention expressly stipulates that the Regulations shall be binding upon the contracting Powers only in case of war between two or more of them, and shall cease to be binding in case a non-contracting Power takes part in the war. But, in spite of this express stipulation, there can be no doubt that in time the Regulations will become universal International Law. For all the great Powers and the greater number of the smaller Powers are already parties to the Convention, and others will certainly become parties later on; and even if a few should never join, the moral force of the Regulations is so overpowering that practically all belligerents will carry them out, just as the Declaration of Paris of 1856 is practically observed by all the Powers, although several of them have not joined.[1]

Binding force of the Laws of War.

§ 69. As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals[2] as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects.

the Laws of War on land annexed to the present Convention." The British War Office, therefore, on November 28, 1903, published a Handbook, drafted by Professor Holland, for the information of the British forces, comprising "The Laws and Customs of War on Land, as defined by the Hague Convention of 1899." This excellent little book presents a model of precision and clearness.

[1] The United States of America (see above, Vol. I. § 32), published on June 27, 1900, a body of rules for the use of her navy under the title "The Laws and Usages of War on Sea"—the so-called "United States Naval War Code." This code, although withdrawn on February 4, 1904, will undoubtedly be the starting-point of a movement for a Naval War Code to be generally agreed upon by the Powers. See below, § 179.

[2] See below, § 248.

In accordance with the German proverb, *Kriegsraeson geht vor Kriegsrecht* (*necessity in war overrules the manner of warfare*), many German authors [1] and the Swiss-Belgian Rivier [2] maintain that the laws of war lose their binding force in case of extreme necessity. Such case of extreme necessity is said to have arisen when violation of the laws of war alone offers a means of escape from extreme danger or of the realisation of the purpose of war—namely, the overpowering of the opponent. This alleged exception to the binding force of the Laws of War is, however, not at all generally accepted by German writers, as, for instance, Bluntschli does not mention it. English, American, French, and Italian writers do not, as far as I can see, acknowledge it. The protest of Professor Westlake [3] against such an exception is, therefore, the more justified, as a great danger would be involved in it. That necessity plays as great a part in war as elsewhere cannot be denied. The fact is that many legal rules of warfare are so framed that they do not apply to a case of necessity; but there are, on the other hand, many rules which know nothing of any exception in case of necessity. Thus, for instance, the rules that poison and poisoned arms are forbidden, and that it is not allowed treacherously to kill or wound individuals belonging to the hostile army, do not lose their binding force even if the escape from extreme danger or the realisation of the purpose of war would depend upon an act of such kind. It may, however, correctly be maintained that all mere usages, in contradistinction to laws, of war may be ignored in case of necessity.

[1] See Lueder in Holtzendorff, IV. pp. 254–257; Ullmann, § 144; Liszt, § 39, IV. 3.

[2] II. p. 242.

[3] See Westlake, Chapters, p. 238.

IV

The Region of War

Taylor, §§ 471 and 498—Heffter, § 118—Lueder in Holtzendorff, IV. pp. 362-364—Klüber, § 242—Liszt, § 40, I.—Ullmann, § 159—Pradier-Fodéré, VI. No. 2733—Rivier, II. pp. 216-219—Boeck, Nos. 214-230—Longuet, §§ 18-25—Perels, § 33—Rettich, "Zur Theorie und Geschichte des Rechts zum Kriege" (1888), pp. 174-213.

Region of War in contradistinction to Theatre of War.

§ 70. Region of war is that part of the surface of the earth in which the belligerents can prepare and execute hostilities against each other. In this meaning region of war ought[1] to be distinguished from theatre of war. The latter is that part of a territory or the Open Sea on which hostilities actually take place. Legally no part of the earth which is not region of war can be made the theatre of war, but not every section of the whole region of war is necessarily theatre of war. Thus, in the last war between England and the two South African Republics the whole of the territory of the British Empire and the Open Sea, as well as the territory of the Republics, was the region of war, but the theatre of war was only in South Africa. On the other hand, in a war between England and another great naval Power it might well happen that the region of war is in many of its sections made the theatre of war.

Particular Region of every War.

§ 71. The region of war depends upon the belligerents, so that every war has its particular region, at least as far as the territorial region is concerned. And that region is the whole of the territories of the belligerents together with the Open Sea[2] as far as parts of either are not neutralised.[3] Since colonies are a

[1] This distinction, although of considerable importance, does not hitherto appear to have been made by any publicist.

[2] See above, Vol. I. § 256.

[3] See below, § 72.

part of the territory of the mother country, they fall within the region of war in case of a war between the mother country and another State, whatever their position may be within the colonial empire they belong to. Thus in a war between Great Britain and France the whole of Australia, of Canada, of India, and so on, would be included with the British Islands as region of war. And, further, as States under the suzerainty of another State are internationally in several respects considered to be a portion of the latter's territory,[1] they fall within the region of war in case of war between the suzerain and another Power. Again, such parts of the territory of a State as are under the *condominium* or under the administration of another State [2] fall within the region of war in case of a war between one of the *condomini* and another Power and in case of war between the administrating and another State. Thus, in a war between Great Britain and Austria-Hungary, Cyprus, as well as Bosnia and Herzegovina, would fall within the region of war. And the Soudan, which is in the *condominium* of England and Egypt, would fall within the region of war in case of a war between England and another State. But neither Cyprus nor Bosnia and Herzegovina would fall within the region of war in case of a war between Turkey and another Power, Great Britain and Austria-Hungary respectively excepted.

That neutral territory is outside the region of war is a matter of course. But there are cases possible in which a part or the whole of the territory of a neutral State falls within the region of war. Such cases arise in wars in which such neutral territories are the very objects of the war, as Korea and the

[1] See above, Vol. I. §§ 91 and 169.

[2] See above, Vol. I. § 171.

Chinese province of Manchuria[1] were in the Russo-Japanese War of 1904 and 1905.

Exclusion from region of war through neutralisation.

§ 72. Although regularly the Open Sea in its whole extent and the whole of the territories of the belligerents are the region of war, certain parts may be excluded through neutralisation. Such neutralisation can take place permanently through a general treaty of the Powers or temporarily through a special treaty of the belligerents. At present no part of the Open Sea is neutralised, as the neutralisation of the Black Sea was abolished[2] in 1871. But the following are some important instances[3] of permanent neutralisation of parts of territories:—

(1) The former Sardinian and since 1860 (see above, Vol. I. § 207) French provinces of Chablais and Faucigny are permanently neutralised through article 92 of the Act of the Vienna Congress, 1815.

(2) The Ionian Islands through article 2 of the Treaty of London of November 14, 1863, are permanently neutralised since they merged in the kingdom of Greece. But this neutralisation was restricted to the islands of Corfu and Paxo only by article 2 of the treaty of London of March 24, 1864. (See Martens, N.R.G., XVIII. p. 63.)

(3) The Suez Canal is permanently neutralised since 1888. (See above, Vol. I. § 183.)

(4) The Straits of Magellan are permanently neutralised through article 5 of the boundary treaty of Buenos Ayres of July 23, 1881. But this treaty is not a general treaty of the Powers, since it is concluded between Argentina and Chile only. (See

[1] See below, § 320.

[2] See above, Vol. I. §§ 181–256.

[3] The matter is thoroughly treated in Rettich, Zur Theorie und Geschichte des Rechtes zum Kriege (1888), pp. 174–213, where also the neutralisation of some so-called international rivers, especially the Danube, Congo, and Niger, is discussed.

Martens, N.R.G., 2nd ser. XII. p. 491, and above, Vol. I. § 195, p. 250, note 2, and § 568, p. 568, note 2.)

(5) The Panama Canal, which is being built by the United States of America, is permanently neutralised through article 3 of the Hay-Pauncefote treaty of November 18, 1901. But this treaty is not a general treaty of the Powers either, being concluded between Great Britain and the United States only.

It is, further, possible for parts of the territories of belligerents and certain parts of the Open Sea to become neutralised through a treaty of the belligerents for the time of a particular war only. Thus, when in 1870 war broke out between France and Germany, the commander of the French man-of-war [1] "Dupleix" arranged with the commander of the German man-of-war "Hertha"—both stationed in the Japanese and Chinese waters—that they should, through their embassies in Yokohama, propose to their respective Governments the neutralisation of the Japanese and Chinese waters for the time of the war. Germany consented, but France refused the neutralisation.

Asserted exclusion of the Baltic Sea from the Region of War.

§ 73. That there is at present no part of the Open Sea neutralised is universally recognised, and this applies to the Baltic Sea, which is admittedly part of the Open Sea. Some writers,[2] however, maintain that the riparian States of the Baltic have a right to forbid all hostilities within the Baltic in case of a war between other States than themselves, and could thereby neutralise the Baltic without the consent and even against the will of the belligerents. This opinion is based on the fact that during the eighteenth century the riparian States of the Baltic claimed that right in several conventions, but it appears untenable, because

[1] See Perels, § 33, p. 160, note 2.

[2] See Perels, pp. 160–163, who discusses the question at some length and answers it in the affirmative.

it is opposed to the universally recognised principle of the freedom of the Open Sea. As no State has territorial supremacy over parts of the Open Sea, I cannot see how such a right of the riparian States of the Baltic could be justified.[1]

V

The Belligerents

Vattel, III. § 4—Phillimore, III. §§ 92-93—Taylor, §§ 458-460—Wheaton, § 294—Bluntschli, §§ 511-514—Heffter, §§ 114-117—Lueder in Holtzendorff, IV. pp. 237-248—Klüber, § 236—G. F. Martens, II. § 264—Gareis, § 83—Liszt, § 39, II.—Ullmann, § 143—Pradier-Fodéré, VI. Nos. 2656-2660—Rivier, II. pp. 207-216—Calvo, IV. §§ 2004-2038—Martens, II. § 108—Heilborn, System, pp. 333-335.

Qualification of a Belligerent (*facultas bellandi*).

§ 74. As the Law of Nations recognises the status of war and its effects as regards rights and duties between the two or more belligerents on the one hand, and on the other between the belligerents and neutral States, the question arises what kind of States are legally qualified to make war and to become thereby belligerents. Publicists who discuss this question at all speak mostly of a *right* of States to make war, a *jus belli*. But if this so-called right is examined, it turns out to be no right at all, as there is no corresponding duty in those against whom the right exists.[2] A State which makes war against another exercises one of its natural functions, and the only question is whether such State is or is not legally qualified to exercise such function. Now, according to the Law of Nations full-Sovereign States alone possess the legal qualification to become

[1] See Rivier, II. p. 218; Bonfils, § 504; Nys, I. pp. 448-450.

[2] See Heilborn, System, p. 333.

belligerents; half- and part-Sovereign States are not legally qualified to become belligerents. Since neutralised States, as Switzerland, Belgium, and Luxemburg, are full-Sovereign States, they are legally qualified to become belligerents, although their neutralisation binds them not to make use of their qualification except for defence. If they become belligerents because they are attacked, they do not lose their character as neutralised States, but if they become belligerents for offensive purposes they *ipso facto* lose this character.

Possibility in contradistinction to qualification to become a Belligerent.

§ 75. Such States as do not possess the legal qualification to become belligerents are by law prohibited from offensive or defensive warfare. But the possession of armed forces makes it possible for them in fact to enter into war and to become belligerents. History records instances enough of such States having actually made war. Thus in 1876 Servia and Montenegro, although at that time vassal States under Turkish suzerainty, declared war against Turkey, and in March 1877 peace was concluded between Turkey and Servia.[1] And when in April 1877 war broke out between Russia and Turkey, the then Turkish vassal State Roumania joined Russia, and Servia declared war anew against Turkey in December 1877. Further, in November 1885 a war was waged between Servia, which had become a full-Sovereign State, and Bulgaria, the vassal State under Turkish suzerainty. The war lasted actually only a fortnight, but the formal treaty of peace was not signed before March 3, 1886, at Bukarest.[2] And although Turkey is a party to this treaty Bulgaria appears thereto independently and on its own behalf.

[1] See Martens, N.R.G., 2nd ser. IV. pp. 12, 14, 172.

[2] See Martens, N.R.G., 2nd ser. IV. p. 284.

Whenever a case arises in which a State lacking the legal qualification to make war nevertheless actually makes war, such State is a belligerent, the contention is real war, and all the rules of International Law respecting warfare apply to it.[1] Therefore, an armed contention between the suzerain and the vassal, between a full-Sovereign State and a vassal State under the suzerainty of another State, and, lastly, between a Federal State and one or more of its members, is war[2] in the technical sense of the Law of Nations.

Insurgents as a Belligerent Power.

§ 76. The distinction between legal qualification and actual power to make war explains the fact that insurgents may become a belligerent Power. It is a customary rule of the Law of Nations that any State can recognise insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war.[3] Such insurgents in fact, although not in law, form a State-like community, and practically they are making war, although their contention is by International Law not considered as war in the technical sense of the term as long as they have not received recognition as a belligerent Power.

Principal and accessory Belligerent Parties.

§ 77. War occurs usually between two States, one

[1] This becomes quite apparent through the fact that Bulgaria has by accession become a party to the Geneva Convention.

[2] See above, § 56, and Baty, International Law in South Africa (1900), pp. 66–68.

[3] See above, § 59. See also Rougier, Les guerres civiles, &c. (1903), pp. 372–447, and Westlake, I. pp. 50–57. The Institute of International Law, at its meeting at Neuchatel in 1900, adopted a body of nine articles concerning the rights and duties of foreign States in case of an insurrection; articles 4–9 deal with the recognition of the belligerency of insurgents. (See Annuaire, XVII. p. 227.)

belligerent party being on each side. But there are cases in which there are on one or on both sides several parties, and in some of such cases principal and accessory belligerent parties are to be distinguished.

Principal belligerent parties are those parties to a war who wage it on the basis of a treaty of alliance, whether such treaty was concluded before or during the war. On the other hand, accessory belligerent parties are such States as provide help and succour only in a limited way to a principal belligerent party at war with another State; for instance, by paying subsidies, sending a certain number of troops or men-of-war to take part in the contention, granting a coaling station to the men-of-war of the principal party, allowing the latter's troops a passage through their territory, and the like. Such accessory party becomes a belligerent through rendering help.

The matter need hardly be mentioned at all were it not for the fact that the question is discussed by the publicists whether or not it involves a violation of neutrality on the part of a neutral State in case it fulfils in time of war a treaty concluded in time of peace, by the terms of which it has to grant a coaling station, the passage of troops through its territory, and the like, to one of the belligerents. This question is identical with the question, to be treated below in § 305, whether a qualified neutrality, in contradistinction to a perfect neutrality, is admissible. Since the answer to this question is in the negative, such State as fulfils a treaty obligation of this kind in time of war may be considered an accessory belligerent party to the war by the other side.

VI

The Armed Forces of the Belligerents

Vattel, III. §§ 223-231—Hall, §§ 177-179, 181—Lawrence, §§ 218-224—Manning, pp. 206-210—Phillimore, III. § 94—Twiss, II. § 45—Halleck, I. pp. 555-562—Taylor, §§ 471-476—Wheaton, §§ 356-358—Bluntschli, §§ 569-572—Heffter, §§ 124-124A—Lueder in Holtzendorff, IV. pp. 371-385—Klüber, 267—G. F. Martens, II. § 271—Gareis, § 83—Ullmann, § 148—Bonfils, Nos. 1088-1098—Despagnet, Nos. 524-527—Pradier-Fodéré, VI. Nos. 2721-2732—Rivier, II. pp. 242-259—Calvo, IV. §§ 2044-2065—Fiore, III. Nos. 1303-1316—Martens, II. § 112—Longuet, §§ 26-36—Mérignhac, pp. 67-84—Pillet, pp. 35-59—Kriegsgebrauch, pp. 4-8—Perels, § 34—Boeck, Nos. 209-213—Dupuis, Nos. 74-91—Lawrence, War, pp. 195-218.

Regular Armies and Navies.

§ 78. The chief part of the armed forces of the belligerents are their regular armies and navies. What kinds of troops constitute a regular army and a regular navy is not for International Law to determine, but a matter of Municipal Law exclusively. Whether or not the so-called Militia and Volunteer corps belong to an army rests entirely with the Municipal Law of the belligerents. There are several States whose armies consist of Militia and Volunteer Corps exclusively, no standing army being provided for. The Hague Regulations stipulate expressly in their article 1 that in countries where Militia or Volunteer Corps constitute the army or form part of it they are included under the denomination "Army." It is likewise irrelevant to consider the composition of a regular army, whether it is based on conscription or not, whether natives only or foreigners also are enrolled, and the like.

Non-combatant Members of Armed Forces.

§ 79. In the main, armed forces consist of combatants, but no army in the field consists of combatants exclusively, as there are always several kinds of other individuals with it, such as couriers, aeronauts,

doctors, farriers, veterinary surgeons, chaplains, nurses, official and voluntary ambulance men, contractors, canteen-caterers, newspaper correspondents, civil servants and diplomatists in the suite of the Commander-in-Chief.

Writers on the Law of Nations do not agree as regards the position of such individuals; they are not mere private individuals, but, on the other hand, are certainly not combatants, although they may—as, for instance, couriers, doctors, farriers, and veterinary surgeons—have the character of soldiers. They may correctly be said to belong *indirectly* to the armed forces. Article 3 of the Hague Regulations expressly stipulates that the armed forces of the belligerents may consist of combatants and non-combatants, and that both in case of capture must be treated as prisoners of war. However, when one speaks of armed forces, generally combatants only are in consideration.

Irregular Forces.

§ 80. Very often the armed forces of belligerents consist throughout the war of their regular armies only, but, on the other hand, it happens frequently that irregular forces take part in the war. Of such irregular forces there are two different kinds to be distinguished—first, such as are authorised by the belligerents; and, secondly, such as are acting on their own initiative and their own account without special authorisation. Formerly it was a recognised rule of International Law that only the members of authorised irregular forces enjoyed the privileges due to the members of the armed forces of belligerents, whereas members of unauthorised irregular forces were considered to be war criminals and could be shot when captured. During the Franco-German war in 1870 the Germans acted throughout according

to this rule with regard to the so-called "Franc-tireurs," requesting the production of a special authorisation of the French Government from every irregular combatant they captured, failing which he was shot. But according to article 1 of the Hague Regulations this rule is now obsolete, and its place is taken by the rule that irregulars enjoy the privileges due to members of the armed forces of the belligerents, although they do not act under authorisation, provided (1) that they are commanded by a person responsible for his subordinates, (2) that they have a fixed distinctive emblem recognisable at a distance, (3) that they carry arms openly, and (4) that they conduct their operations in accordance with the laws and customs of war. It must, however, be emphasised that this rule applies only to irregulars fighting in bodies, however small. Such individuals as take up arms or commit hostile acts singly and severally are still liable to be treated as war criminals, and shot.[1]

Levies *en masse.*

§ 81. It sometimes happens during war that on the approach of the enemy a belligerent calls the whole population of the country to arms and thus makes them a part, although a more or less irregular part, of his armed forces. Provided they receive some organisation and comply with the laws and usages of war, the combatants who take part in such a levy *en masse* organised by the State enjoy the privileges due to members of armed forces.

It sometimes happens, further, during wars, that a levy *en masse* takes place spontaneously without organisation by a belligerent, and the question arises whether or not those who take part in such levies *en masse* belong to the armed forces of the belligerents, and enjoy therefore the privileges due to members

[1] See below, § 254.

of such forces. Article 2 of the Hague Regulations stipulates that the population of a territory not yet occupied who, on the enemy's approach, spontaneously take up arms to resist the invading enemy, without having time to organise themselves under responsible commanders and to procure fixed distinctive emblems recognisable at a distance, shall nevertheless enjoy the privileges due to armed forces, provided that they act otherwise in conformity with the laws and usages of war. But this case is totally different from a levy *en masse* by the population of a territory already occupied by the enemy, for the purpose of freeing the country from the invader. The quoted stipulation of the Hague Regulations does not cover this case, in which, therefore, the old customary rule of International Law is valid, that those taking part in such a levy *en masse*, if captured, are liable to be shot.[1]

Barbarous Forces.

§ 82. As International Law grew up amongst the States of Christendom, and as the circle of the members of the Family of Nations includes only civilised, although not necessarily Christian, States, all writers on International Law agree that in wars between themselves the members of the Family of Nations should not make use of barbarous forces—that is, troops consisting of individuals belonging to savage tribes and barbarous races. But it can hardly be maintained that a rule of this kind has grown up in practice, nor has it been stipulated by treaties, the

[1] See below, § 254. Article 85 of the American Instructions for the Government of Armies in the Field of 1863 has enacted this rule as follows: "War rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled Government or not. . . ."

Hague Regulations overlooking this point. This being the fact, it is difficult to say whether the members of such barbarous forces, if employed in a war between members of the Family of Nations, would enjoy the privileges due to members of armed forces generally. I see no reason why they should not, provided such barbarous forces would or could comply with the laws and usages of war prevalent according to International Law. But the very fact that they are barbarians makes it probable that they could or would not do so, and then it would be unreasonable to grant them the privileges generally due to members of armed forces, and it would be necessary to treat them according to discretion. But it must be specially observed that the employment of barbarous forces must not be confounded with the enrolling of coloured individuals into the regular army and the employment of regiments consisting of disciplined coloured soldiers. There is no reason whatever why, for instance, the members of a regiment eventually formed by the United States of America out of negroes bred and educated in America, or why members of Indian regiments under English commanders, if employed in wars between members of the Family of Nations, should not enjoy the privileges due to the members of armed forces according to International Law.

Privateers.

§ 83. Formerly privateers were a generally recognised part of the armed forces of the belligerents, private vessels being commissioned through Letters of Marque by the belligerents to carry on hostilities at sea, and particularly to capture enemy merchantmen.[1] From the fifteenth century, when privateering

[1] See Martens, Essai concernant les armateurs, les prises, et surtout les reprises (1795).

began to grow up, down to the eighteenth century, belligerents used to grant such Letters of Marque to private ships owned by their subjects and by the subjects of neutral States. But during the eighteenth century the practice grew up that the belligerents granted Letters of Marque to private ships of their own subjects only.[1] However, privateering was abolished by the Declaration of Paris in 1856 as between the signatory Powers and others who joined it later on. And although privateering would still be legal as between other Powers, it will in future scarcely be made use of. In all the wars that occurred after 1856 between such Powers, Letters of Marque were not granted to private ships.[2]

Volunteer Fleet.

§ 84. A case which happened in 1870, soon after the outbreak of the Franco-German war, gave occasion for the question whether a volunteer fleet could be considered a part of the armed naval forces of a belligerent. As the North-German Confederation owned only a few men-of-war, the creation of a volunteer fleet was intended. The King of Prussia, as President of the Confederation, invited the owners of private German vessels to make them a part of the German navy under the following conditions: Every

[1] Many publicists maintain that nowadays a privateer commissioned by another State than that of which he is a subject is liable to be treated as a pirate when captured. With this, however, I cannot agree; see above, Vol. I. § 273, Hall, § 81, and below, § 330.

[2] See below, § 177. It is confidently to be hoped that the great progress made by the abolition of privateering through the Declaration of Paris will never be undone. But it is of importance to note the fact that up to the present day endeavours have been made on the part of free-lances to win public opinion for a retrograde step. See, for instance, Gibson Bowles, The Declaration of Paris of 1856 (1900); see also Perels, pp. 177–179. The Declaration of Paris being a law-making treaty which does not provide the right of the single signatory Powers to give notice of withdrawal, a signatory Power is not at liberty to give such notice, although Mr. Gibson Bowles (l. c. pp. 169–179) asserts that this could be done. See above, Vol. I. § 12.

ship should be assessed as to her value, and 10 per cent. of such value should at once be paid in cash to the owner as a price for the charter of the ship. The owner should engage the crew himself, but the latter should become for the time of the war members of the German navy, wear the German naval uniform, and the ship should sail under the German war flag and be armed and adapted for her purpose by the German naval authorities. Should the ship be captured or destroyed by the enemy, the assessed value should be paid to her owners in full; but should it be restored after the war undamaged, the owner should retain the 10 per cent. received as charter price. All such vessels should only try to capture or destroy French men-of-war, and if successful the owner should receive a price between 1,500*l.* and 7,500*l.* as premium. The French Government considered this scheme a disguised evasion of the Declaration of Paris which abolished privateering, and requested the intervention of Great Britain. The British Government brought the case before the Law Officers of the Crown, who declared the German scheme to be substantially different from the revival of privateering, and consequently the British Government refused to object to it. The scheme, however, was never put into practice.[1]

Now the writers on International Law differ, in spite of the opinion of the British Law Officers, as to the legality of the above scheme; but, on the other hand, they are unanimous that not every scheme for a voluntary fleet is to be rejected. Russia,[2] in fact, since 1877, has possessed a voluntary fleet. France[3] has

[1] See Perels, § 34; Hall, § 182; Lawrence, § 224; Boeck, No. 211; Dupuis, Nos. 81-84.

[2] See Dupuis, No. 85.

[3] See Dupuis, No. 86.

made arrangements with certain steamship companies according to which their mail-boats have to be constructed on plans approved by the Government, have to be commanded by officers of the French navy, and have to be incorporated in the French navy at the outbreak of war. Great Britain has entered from 1887 onwards into agreements with several powerful British steamship companies for the purpose of securing their vessels at the outbreak of hostilities, and the United States of America in 1892 made similar arrangements with the American Line.[1] But it must be specially observed that a proper commission must be given to each vessel belonging to a volunteer fleet and the like, and that such vessels cannot alternately claim the character of belligerent men-of-war and of merchantmen.

A remarkable case of this kind is that of the "Peterburg" and the "Smolensk," which occurred during the Russo-Japanese war.[2] On July 4 and 6, 1904, these vessels, which belonged to the Russian volunteer fleet in the Black Sea, were allowed to pass the Bosphorus and the Dardanelles, which are closed[3] to men-of-war of all nations, because they were flying the Russian commercial flag. They likewise passed the Suez Canal under their commercial flag, but after leaving Suez they converted themselves into men-of-war by hoisting the Russian war flag, and began to exercise over neutral merchantmen all rights of supervision which belligerents can claim for their cruisers in time of war. On July 13 the "Peterburg" captured the British P. & O. steamer "Malacca" for alleged carriage of contraband, and put a prize-

[1] See Lawrence, § 224, and Dupuis, Nos. 87–88.

[2] See the details of the career of these vessels in Lawrence, War, pp. 205 *seq.*

[3] See above, Vol. I. § 197.

crew on board for the purpose of navigating her to Libau. But the British Government protested; the "Malacca" was released at Algiers on her way to Libau on July 27, and Russia agreed that the "Peterburg" and the "Smolensk" should no longer act as cruisers, and that all neutral vessels captured by them should be released.

The Crews of Merchantmen.

§ 85. In a sense the crews of merchantmen owned by subjects of the belligerents belong to the latter's armed forces. For those vessels are liable to be seized by enemy men-of-war, and if attacked for that purpose they can defend themselves, can return the attack, and eventually seize the attacking men-of-war. The crews of merchantmen become in such cases combatants, and enjoy all the privileges of the members of armed forces. But unless attacked they must not commit hostilities, and if they do so they are liable to be treated as criminals just like private individuals committing hostilities in land warfare.[1]

Deserters and Traitors.

§ 86. The privileges of members of armed forces cannot be claimed for members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They can be, and always are, treated as criminals. And the like is valid with regard to such treasonable subjects of a belligerent as, without having been members of his armed forces, are fighting in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished.[2]

[1] See Hall, § 183. [2] See below, § 222, and Hall, § 190.

VII

Enemy Character

Hall, §§ 167–175—Lawrence, §§ 169–183—Phillimore, III. §§ 82–86—Twiss, II. §§ 152–162—Taylor, §§ 468 and 517—Walker, §§ 39–43—Wharton, III. §§ 352–353—Wheaton, §§ 324–341—Geffcken in Holtzendorff, IV. pp. 581–588—Calvo, IV. §§ 1932–1952—Fiore, III. Nos. 1432–1436—Boeck, Nos. 156–190—Dupuis, Nos. 92–129.

On Enemy Character in general.

§ 87. Since the belligerents, for the realisation of the purpose of war, are entitled to many kinds of measures against enemy persons and enemy property, the question must be settled as to what persons and what property are vested with enemy character. Now it is, generally speaking, correct to say that, whereas all the subjects of the belligerents and all the property of such subjects bear enemy character, the subjects of neutral States and the property of such subjects do not bear enemy character. This rule has, however, important exceptions. For under certain circumstances and conditions enemy persons and property of enemy subjects may not bear, and, on the other hand, subjects of neutral States and their property may bear, enemy character. And it is even possible that a subject of a belligerent may for some parts bear enemy character as between himself and his home State.[1]

[1] It is impossible to reproduce in a treatise all the details concerning enemy character as worked out by the verdicts of British and American Courts. The following §§ 88–92 attempt to map out the subject under precisely defined and broad principles only, leaving the details to the study of the following leading cases: The Vigilantia, 1 Rob. 1; the Harmony, 2 Rob. 322; the Indian Chief, 3 Rob. 12; the Portland, 3 Rob. 44; the Anna Catherina, 4 Rob. 119; the Phœnix, 5 Rob. 20; the Ocean, 5 Rob. 91; the Jonge Klassina, 5 Rob. 297; the Ann, 1 Dodson, 221; the Freundschaft, 4 Wheaton, 105; the Venus, 8 Cranch, 253; Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 195.—But it must be specially observed that these principles of the British and American practice are, in spite of their common-sense basis, not

Subjects of Neutral States rendering services to Belligerents.

§ 88. When after the outbreak of war the subject of a neutral State enters into or remains in the armed forces or in the civil service of a belligerent, he acquires thereby enemy character to the same extent as an enemy subject. All measures that are allowed during war against enemy subjects are likewise allowed against such subjects of neutrals who have acquired enemy character. Thus, during the late South African War hundreds of subjects of neutral States who were fighting in the ranks of the Boers were captured by Great Britain and retained as prisoners of war till the end of the struggle.

On the other hand, when a subject of a neutral State does not enter the armed forces of a belligerent, but only renders certain specific services to a belligerent, he acquires enemy character to the extent only of such specific services, and every case of such kind must be judged on its own merits. Thus, carriage of contraband and of analogous of contraband are instances of such services.[1] A subject of a neutral State can even *before the outbreak of war* to such a degree identify himself or his property with an intending belligerent, that war can be commenced by an attack[2] upon his person or his property.

A remarkable case of that kind occurred at the outbreak of the Chino-Japanese War in 1894.

generally recognised on all points, and it ought therefore not to be maintained that they represent generally recognised rules of the Law of Nations. The French practice in particular differs in many respects from British and American, as can be seen from Boeck, Dupuis, Calvo, and Fiore.

[1] There is no doubt that neutral merchantmen carrying coal for a belligerent fleet *en route*, as happened during the Russo-Japanese war when the Baltic Fleet went out to the Far East, bear enemy character. See also below, § 289, concerning the "Rule of 1756."

[2] See Hall, § 168*; Takahashi, Cases on International Law during the Chino-Japanese War (1899), pp. 27–51; Holland, Studies, pp. 126–128

On July 14, the "Kow-shing," a British ship, was hired at Shanghai by the Chinese Government to serve as a transport for eleven hundred Chinese soldiers and also for arms and ammunition from Tien-tsin to Korea. She was met on July 25 near the island of Phung-do, in Korean waters, by the Japanese fleet; she was signalled to stop, was visited by some prize officers, and, as it was apparent that she was a transport for Chinese soldiers, she was ordered to follow the Japanese cruiser "Naniwa." But although the British captain of the vessel was ready to follow these orders, the Chinese on board would not allow him to do so. Thereupon, after some further negotiation in vain, the Japanese opened fire and sank the vessel.

Enemy subjects domiciled abroad.

§ 89. Enemy subjects having their permanent residence abroad on the territory of a neutral State for the purpose of commerce or pleasure do not bear enemy character, nor does their property abroad. For although they are enemy subjects, and might return to their home State and take up arms, they are for the time being under the control of a neutral State, and are thereby prevented from carrying on hostilities of any kind. They are, therefore, for all practical purposes, considered neutrals, and the neutral on whose territory they reside can claim that their property, although found on captured enemy ships, is not to be appropriated.

Subjects of Neutral States domiciled on Belligerents' territory.

§ 90. On the other hand, subjects of neutral States domiciled on the territories of the belligerents acquire in a sense enemy character, for they contribute by their payment of taxes to the support of the belligerents. And although they cannot be required to take up arms, they belong to the

population of the enemy territory. Their ships and goods on the Open Sea and within the territorial waters of the belligerents may therefore be captured, and their property on land is submitted to all measures which may be taken against private property of enemy subjects by the invading enemy. But it should be emphasised that their persons and property do nevertheless not lose the protection of their neutral home-State against treatment inconsistent with the laws of war.[1]

Subjects of Belligerents domiciled on each other's Territory.

§ 91. Since domicile is in many respects the test of enemy character, the private property of even such belligerents' subjects as are domiciled on each other's territory and allowed to remain there after the outbreak of the war acquires enemy character in the eyes of the belligerent Power whose subjects they are. The goods of such subjects on enemy ships may therefore be captured by the men-of-war of their home State, and their property on land is submitted to all measures which may be taken against private property of enemy subjects by the invading enemy. On the other hand, the private property of such enemy subjects loses its enemy character in the eye of the belligerent Power on whose territory they are allowed to remain, and therefore cannot be captured by his men-of-war, although found on enemy ships.

Property of foreigners on Enemy Territory or incorporated in Enemy Trade.

§ 92. The property of such subjects of neutral States as are not domiciled on enemy territory may nevertheless be vested with enemy character. Thus, the produce of an estate on enemy territory belonging to a neutral foreigner abroad may be captured, as may also all such property of neutral foreigners abroad, having a house of trade on enemy territory, as

[1] See below, § 318.

is concerned in commercial transactions of such house. Thus, further, merchantmen owned by subjects of neutral States, but sailing under enemy flag, may be captured.[1]

[1] See below, § 198. As regards effect of sale of enemy vessels and of enemy goods thereon during war, see below, §§ 199 and 200.

CHAPTER II

THE OUTBREAK OF WAR

I

Commencement of War

Grotius, c. 3, §§ 5–14—Bynkershoek, Quaestiones juris publ. I. c. 2—Vattel, III. §§ 51–65—Hall, § 123—Lawrence, § 161—Manning, pp. 161–163—Phillimore, III. §§ 51–56—Twiss, II. §§ 31–40—Halleck, I. pp. 521–526—Taylor, §§ 455–456—Walker, § 37—Wharton, III. § 333–335—Wheaton, § 297—Bluntschli, §§ 521–528—Heffter, § 120—Lueder in Holtzendorff, IV. pp. 332–347—Gareis, § 80—Liszt, § 39, V.—Ullmann, § 145—Bonfils, Nos. 1027–1043—Despagnet, Nos. 517–520—Pradier-Fodéré, VI. Nos. 2671–2693—Rivier, II. pp. 220–228—Calvo, IV. §§ 1899–1911—Fiore, III. Nos. 1272–1276—Martens, II. § 109—Longuet, §§ 1–7, 15–16—Mérignhac, pp. 29–41—Pillet, pp. 61–72—Lawrence, War, pp. 26–44—Brocher in R.I., IV. (1872), p. 400; Féraud-Giraud in R.I., XVII. (1885), p. 19; Nagaoka in R.I., 2nd ser. VI. p. 475—Holland, Studies, p. 115—Sainte-Croix, "La Déclaration de guerre et ses effets immédiats" (1892)—Bruyas, "De la déclaration de guerre," &c. (1899)—Rolin in Annuaire, XX. (1904), pp. 64–70—Ebren and Martens in R. G. xi. (1904), pp. 133–150.

Three modes of commencing War.

§ 93. A state of war may in fact arise either through a declaration of war, or through a proclamation and manifesto of a State that it considers itself at war with another State, or, thirdly, through committing certain hostile acts of force against another State. In practice all the three modes of commencing war occur, and history presents many instances of wars commenced in one or other way. If the practice of the States is taken into consideration, it becomes apparent that no rule of the Law of Nations is in existence which prescribes to intending belligerents

the way in which war is to be commenced. The only rules which may be said to exist concerning the commencement of war are that negotiation [1] must precede war, and that, according to article 2 of the Hague Convention for the peaceful settlement of international differences, recourse must be had, *as far as circumstances allow it*,[2] to the good offices or mediation of one or more friendly Powers.

Declaration of War.

§ 94. A declaration of war is a communication of one State to another that it considers a condition of war existing between them. In former times declarations of war used to take place under greater or lesser solemnities, but nowadays all these solemnities have disappeared, and declarations of war take place through a simple communication in any form. They may even be coupled with an ultimatum, and they are in such a case conditional declarations of war, no war being declared if the respective State submits to the ultimatum. Many writers maintain that there is a rule of International Law forbidding the commencement of war without a declaration of war. But such rule, in fact, does not exist, for a great many wars take place without an initiative declaration of war. Nor is the necessity of a declaration of war stipulated by a general treaty or obligatory according to a recognised custom of the members of the Family of Nations.[3] It must be specially observed that, in case of a declaration of war, the war is considered to have been commenced with the date of its declaration although hostilities may not have been commenced till a much later date.

[1] See above, § 3, where the rule is quoted that no State is allowed to use compulsive means of settling disputes before negotiation has been tried.

[2] As regards the juristic value of this clause, see above, § 10, No. 1.

[3] See below, § 96.

War Manifestoes.

§ 95. A manifesto or proclamation of war is a public announcement of a State to its subjects, to neutral States, or *urbi et orbi*, that it considers itself at war with another State. A war manifesto may be an initiative step of war, or follow either a declaration of war or the actual commencement of war through a hostile act of force. The assertion of many writers that, if not a declaration of war, at least a manifesto is necessary for the commencement of war, is not based on a generally recognised rule of International Law, although the publication of war manifestos has become more and more usual in the nineteenth century. And it must be emphasised that there is good reason for the maintenance of this usage, for war is not only a relation between the belligerents but also between these and neutral States, and the latter cannot be held to fulfil the duties of neutrality before they know of the outbreak of war.

Initiative hostile Acts of War.

§ 96. Hostile acts of force initiative of war are such hostile acts as are considered by the other party acts of war, since, as has been stated above, § 55, hostile acts of force may be committed by a State against another without war breaking out thereby, the passive party acquiescing in the act. For a war to commence by unilateral hostile acts of force, it is at least necessary that the passive party declares *expressis verbis*, or through unmistakable conduct, that it considers these hostilities as acts of war. Of what kinds of acts these hostilities may consist, it cannot be decisively laid down. They may, to give examples, consist of occupation of a part of foreign territory, an inroad into a foreign country, the blockade of a harbour, an attack on the frontier, an attack on a man-of-war, the capture of a merchantman, and the like. And it must be specially observed that the

respective acts of force need not at all be intended to be hostile, provided they are hostile *de facto*. Thus, acts of force by way of reprisals or during a pacific blockade or an intervention may be considered acts of war by the passive party and thereby contain the commencement of war, although they were not intended as acts of war.

That a war initiated by acts of force without a previous declaration or manifesto of war is nevertheless war according to International Law, nobody denies. But many writers assert that the commencement itself of such a war contains a violation of International Law. If this were correct, many [1] important, and in their results far-reaching, wars of the seventeenth, eighteenth, and nineteenth centuries would have been begun with a violation of International Law. But the very fact of these numerous wars having been commenced through hostile acts of force only, shows that the practice of the States never adopted the alleged [2] rule of the necessity of a declaration or a manifesto of war. This does not mean that a State would be justified in opening hostilities without any preceding conflict. There is no greater violation of the Law of Nations than that committed by a State which commences hostilities in time of peace without previous controversy and without having tried to settle the difference through negotiation.[3] But after negotiation has been tried in vain, a State

[1] See Maurice, Hostilities without Declaration of War (1883).

[2] It cannot be denied that many influential publicists insist upon necessity of a declaration of war. See, for instance, Grotius, III. c. 3, § 6; Vattel, III. § 51; Calvo, IV. § 1907; Bluntschli, § 521; Fiore, III. No. 1274; Heffter, § 120. But the practice of the States has never accepted this opinion, and there are many publicists who approve of this practice. See, for instance, Bynkershoek, Quaest. jur. publ. I. c. 2; Klüber, § 238; G. F. Martens, § 267; Twiss, II. § 35; Phillimore, III. §§ 51–55; Hall, 123; Gareis, § 80; Liszt, § 39; Ullmann, § 145.

[3] See above, § 93.

does not act treacherously in case it resorts to hostilities without a declaration of war, especially after diplomatic intercourse has been broken off.

II

Effects of the Outbreak of War

Vattel, III. § 63—Hall, §§ 124-126—Lawrence, §§ 165-168—Manning, pp. 163-165—Phillimore, III. §§ 67-91—Twiss, II. §§ 41-61—Halleck, I. pp. 526-552—Taylor, §§ 461-468—Walker, §§ 44-50—Wharton, III. §§ 336-337A—Wheaton, §§ 298-319—Heffter, §§ 121-123—Lueder in Holtzendorff, IV. pp. 347-363—Gareis, § 81—Liszt, § 39, V—Ullmann, §§ 146-147—Bonfils, Nos. 1044-1065—Despagnet, Nos. 521-523—Pradier-Fodéré, VI. Nos. 2694-2720—ivier, II. pp. 228-237—Calvo, IV. §§ 1911-1931—Fiore, III. Nos. 1290-1301—Martens, II. § 109—Longuet, §§ 8-15—Mérignhac, pp. 42-65—Pillet, pp. 72-84—Lawrence, War, pp. 45-55—Sainte Croix, "La Déclaration de guerre et ses effets immédiats" (1892), pp. 166-207.

General Effects of the Out break of War.

§ 97. When war breaks out, although it is limited to only two members of the Family of Nations, nevertheless the whole Family of Nations is thereby affected, since the rights and duties of neutrality devolve upon such States as are not parties to the war. And the subjects of neutral States may feel the consequences of the outbreak of war in many ways. War is not only a calamity to the commerce and industry of the whole world, but also involves the alteration of the legal position of neutral merchantmen on the Open Sea, and of the subjects of neutral States within the boundaries of the belligerents. For the belligerents have the right of visit, search, and eventually capture of neutral merchantmen on the Open Sea, and foreigners who remain within the boundaries of the belligerents acquire, although sub-

jects of neutral Powers, enemy character.[1] However, the outbreak of war tells chiefly and directly upon the relations between the belligerents and their subjects. Yet it would not be correct to maintain that all legal relations disappear with the outbreak of war between the parties thereto and between their subjects. War is not a condition of anarchy and indifferent or hostile to law, but a fact recognised and ruled by International Law, although it involves a rupture of peaceful relations between the belligerents, and their subjects also for the most part.

Rupture of Diplomatic Intercourse and Consular Activity.

§ 98. The outbreak of war effects at once the rupture of diplomatic intercourse between the belligerents, if such rupture has not already taken place. The respective diplomatic envoys are recalled and ask for their passports, or receive them without any previous request, but they enjoy their privileges of inviolability and exterritoriality for the period of time requisite for leaving the country. Consular activity comes likewise to an end through the outbreak of war.[2]

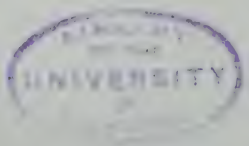
Cancellation of Treaties.

§ 99. The doctrine was formerly held, and a few writers[3] maintain it even now, that the outbreak of war *ipso facto* cancels all treaties previously concluded between the belligerents, such treaties only excepted as have been concluded especially for the case of war. The vast majority of modern writers on International Law have abandoned this standpoint, and the opinion is pretty general that war by no means annuls every treaty. But unanimity in regard to such treaties as are and such as are not cancelled by war does not exist. Neither does a uniform practice of the States exist, cases having occurred in which States have

[1] See above, § 90.

[2] See above, Vol. I. §§ 413 and 436.

[3] See, for instance, Phillimore, III. § 530, and Twiss, I. § 252, in contradistinction to Hall, § 125.



expressly declared that they considered all treaties annulled through war. Thus the whole question remains as yet unsettled. But nevertheless with the majority of writers a conviction may be stated to exist on the following points:—

(1) The outbreak of war cancels all political treaties between the belligerents, such as treaties of alliance for example, which have not been concluded for the purpose of setting up a permanent condition of things.

(2) On the other hand, it is obvious that such treaties are not annulled as have especially been concluded for the case of war, as treaties in regard to the neutralisation of certain parts of the territories of the belligerents for example.

(3) Such political and other treaties as have been concluded for the purpose of setting up a permanent condition of things are not *ipso facto* annulled by the outbreak of war, but in the treaty of peace nothing prevents the victorious party from imposing upon the other party any alterations in, or even the dissolution of, such treaties.

(4) Such non-political treaties as do not intend to set up a permanent condition of things, as treaties of commerce for example, are not *ipso facto* annulled, but the parties may annul them or suspend them according to discretion.

(5) So-called law-making[1] treaties, as the Declaration of Paris for example, are not cancelled through the outbreak of war. The same is valid in regard to all treaties to which a multitude of States are parties, as the International Postal Union for example, but the belligerents may suspend them, as far as they themselves are concerned, in case the necessities of war compel them to do so.

[1] See above, Vol. I. §§ 18, 492, 555–568.

§ 100. The outbreak of war affects likewise such subjects of the belligerents as are at the time within the enemy's territory. In former times they could at once be retained as prisoners of war, and many States concluded therefore in time of peace special treaties for the time of war expressly stipulating a specified period during which their subjects should be allowed to leave each other's territory unmolested.[1] Through the influence of such treaties, which became pretty general during the eighteenth century, it became an international usage and practice that all enemy subjects must be allowed to withdraw within a reasonable period. The last instance of the former rule is seen in the arrest and retention as prisoners of war of some ten thousand Englishmen in 1803 in France when war broke out between Great Britain and France, many of whom were not liberated before 1814. Although during the whole of the nineteenth century no other instance occurred, several publicists[2] even nowadays maintain that according to strict law the old rule is still in force. But this assertion is certainly unfounded. On the contrary, it may safely be maintained that there is now a customary rule of International Law that all enemy subjects must be allowed a reasonable period for withdrawal. But a belligerent need not allow[3] enemy subjects to remain on his territory, although this is sometimes done. Thus, during the Crimean War Russian subjects in Great Britain and France were allowed to remain there, as were likewise Russians in Japan and Japanese in Russia during the Russo-Japanese War. On the other hand, France expelled all Germans during the Franco-German war in 1870, the former

Precarious position of Belligerents' subjects on Enemy Territory.

[1] See a list of such treaties in Hall, § 126, p. 407, note 1.

[2] See Twiss, II. § 50; Rivier, II. p. 230; Liszt, § 39.

[3] See above, Vol. I. § 324.

South African Republics expelled most of the British subjects when war broke out in 1899, and Russia, although during the Russo-Japanese War she allowed Japanese subjects to remain in other parts of her territory, expelled them from her provinces in the Far East. In case a belligerent allows the residence of enemy subjects on his territory, he can, of course, give the permission under certain conditions only, such as an oath to remain neutral or a promise not to leave a certain region, and the like.

Trade and the like between the Subjects of Belligerents.

§ 101. British and American writers assert the existence of rules of International Law that on the outbreak of war, with the exception of contracts which arise out of the condition of war and are permitted under the customs of war, as for instance ransom bills, all contracts, including contracts of partnership concluded before the war between subjects of the belligerents, become extinct or suspended; that no subject of one belligerent can sue or be sued in the Courts of the other belligerent; that all peaceful intercourse, especially trading, is prohibited between the subjects of the belligerents.

But such a rule of International Law in fact does not exist and has never existed, as International Law has nothing to do with the conduct of private individuals, but is a law between States only and exclusively. The fact is that all the above items are naturally within the competence of Municipal Law, which can govern and has governed them at discretion. The Municipal Law of the belligerents concerned may or may not allow commercial or any other intercourse between their private subjects, may suspend or cancel existing contracts including partnership, may or may not allow an enemy subject to sue and to be sued in Courts of justice.

As regards British[1] law, there is no doubt that it prohibits commercial and other friendly intercourse between British and enemy subjects, cancels existing contracts including partnership, does not allow an enemy subject to sue or to be sued in British Courts. But this British prohibition, which coincides with a similar prohibition on the part of several other States, is not the outcome of the Law of Nations,[2] but of Municipal Law.

Position of Belligerent's Property in the Enemy State.

§ 102. In former times all private and public enemy property, immoveable or moveable, on each other's territory could be confiscated by the belligerents at the outbreak of war, as could also enemy debts; and the treaties concluded between many States with regard to the withdrawal of each other's subjects at the outbreak of war stipulated likewise the unrestrained withdrawal of the private property of their subjects. Through the influence of such treaties as well as of Municipal Laws and Decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate private enemy property nor annul enemy debts on their territory. The last case of confiscation of private property is that of 1793, at the outbreak of war between France and Great Britain. No case of confiscation has occurred during the nineteenth century, and although several writers maintain that according to strict law the old rule, in contradistinction to the usage which they do not deny, is still valid, it may safely be maintained that it is obsolete, and that there is now a customary rule of International

[1] The leading case is that of the Hoop, 1 Rob. 196.

[2] The only British publicist who seems to agree with me is Manning, p. 167. Discussing the rule that trade is forbidden between the subjects of the belligerents, he says: "But this is rather a regulation of Municipal Law than part of the Law of Nations."

Law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent. Accordingly, the embargo of enemy ships in the harbours of the belligerents at the outbreak of war is no longer made use of,[1] and a reasonable time is granted to them to leave those harbours. On the other hand, this rule does not prevent a belligerent from suspending the payment of enemy debts till after the war for the purpose of prohibiting the increase of enemy resources; from seizing public enemy property on his territory, such as funds, ammunition, provisions, and other valuables; and from preventing the withdrawal of private enemy property which may be made use of by the enemy for military operations, such as arms and munitions.[2] And it may be expected in the future that those enemy mail-boats which were built from special designs for the purpose of quickly turning them into cruisers of the navy will be prevented from leaving the ports of a belligerent at the outbreak of war.[3]

[1] See above, § 40, and below, § 364.

[2] The indulgence granted to enemy merchantmen in Russian and Japanese ports at the outbreak of the war in 1904, to leave those ports unmolested within a certain period of time, was therefore made to depend upon the absence of contraband in the cargoes. See Lawrence, War, p. 52.

[3] See Lawrence, War, p. 55.

CHAPTER III

WARFARE ON LAND

I

On Land Warfare in General

Vattel, III. §§ 136-138—Hall, §§ 184-185—Phillimore, III. § 94—Taylor, § 469—Wheaton, § 342—Bluntschli, §§ 534-535—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 388-389—Gareis, § 84—Bonfils, Nos. 1066-1067—Pradier-Fodéré, VI. Nos. 2734-2741—Longuet, § 41—Mérignhac, p. 146—Pillet, pp. 85-89—Kriegsgebrauch, p. 9—Holland, War, Nos. 5-7.

Aims and Means of Land Warfare.

§ 103. The purpose of war, namely, the overpowering of the enemy, is served in land warfare through two aims,[1]—which are, first, defeat of the enemy armed forces on land, and, secondly, occupation and administration of the enemy territory. The chief means through which belligerents try to realise those aims, and which are always conclusively decisive, are the different sorts of force applied against enemy persons. But beside such violence against enemy persons there are other means which are not at all unimportant, although they play a secondary part only. Such means are: appropriation, utilisation, and destruction of enemy property; siege; bombardment; assault; espionage; utilisation of treason; ruses. All these means of warfare on land must be discussed in this chapter, as must also occupation of enemy territory.

[1] Aims of land warfare must not be confounded with ends of war; see above, § 66.

Lawful and Unlawful Practices of Land Warfare.

§ 104. But—to use the words of article 22 of the Hague Regulations—"the belligerents have not an unlimited right as to the means they adopt for injuring the enemy." For not all possible practices of injuring the enemy in offence and defence are lawful, certain practices being prohibited under all circumstances and conditions, and other practices being only under certain circumstances and conditions, or only with certain restrictions, allowed. The principles of chivalry and of humanity have been at work[1] for many hundreds of years to create these restrictions, and their work has not yet reached its end. However, apart from these restrictions, all kinds and degrees of force and many other practices may be made use of in war.

Objects of the Means of Warfare.

§ 105. In a sense all means of warfare are directed against one object only—namely, the enemy State, which is to be overpowered by all legitimate means. Apart from this, the means of land warfare are directed against different objects.[2] Such objects are chiefly the members of the armed forces of the enemy, but likewise, although in a lesser degree, other enemy persons; further, private and public property, fortresses, and roads. Indeed, apart from certain restrictions, everything may eventually be the object of a means of warfare, provided the means are legitimate in themselves and are capable of fostering the realisation of the purpose of war.

Land Warfare in contradistinction to Sea Warfare.

§ 106. Land warfare must be distinguished from sea warfare chiefly for two reasons. First, their circumstances and conditions differ widely from each other, and, therefore, their means and practices differ also. Secondly, the Hague Peace Conference has enacted

[1] See above, § 67.

[2] See Oppenheim, Die Objekte des Verbrechens (1894), pp. 64–146, where the relation of human actions with their objects is fully discussed.

rules regarding land warfare only, leaving the further development of the rules regarding sea warfare to custom and usage as hitherto.

II

Violence Against Enemy Persons

Grotius, III. c. 4—Vattel, III. §§ 139-159—Hall, §§ 128, 129, 185—Lawrence, §§ 185, 186, 190-192—Maine, pp. 123-148—Manning, pp. 196-205—Phillimore, III. §§ 94-95—Halleck, II. pp. 14-18—Taylor, §§ 477-480—Walker, § 50—Wheaton, §§ 343-345—Bluntschli, §§ 557-563—Heffter, § 126—Lueder in Holtzendorff, IV. pp. 390-394—Gareis, § 85—Klüber, § 244—Liszt, § 40, III.—G. F. Martens, II. § 272—Ullmann, § 149—Bonfils, Nos. 1068-1071, 1099, 1141—Despagnet, Nos. 528-529—Pradier-Fodéré, VI. Nos. 2742-2758—Rivier, II. pp. 260-265—Calvo, IV. 2098-2105—Fiore, III. Nos. 1317-1320, 1342-1348—Martens, II. § 110—Longuet, §§ 42-49—Mérignhac, pp. 146-165—Pillet, pp. 85-95—Kriegsgebrauch, pp. 9-11—Holland, War, 55-58—Zorn, "Kriegsmittel und Kriegführung im Landkrieg nach den Bestimmungen der Haager Conferenz, 1899" (1902).

On Violence in general against Enemy Persons.

§ 107. As war is a contention between States for the purpose of overpowering each other, violence consisting in different sorts of force applied against enemy persons is the chief and decisive means of warfare. These different sorts of force are used against combatants as well as non-combatants, but with discrimination and differentiation. The purpose of application of violence against combatants is their disablement so that they can no longer take part in the fighting. And this purpose may be realised through either killing or wounding them, or making them prisoners. As regards non-combatant members of armed forces, private enemy persons showing no hostile conduct, and officials in important positions, only minor means of force may as a rule be applied,

since they do not take part in the armed contention of the belligerents.

Killing and Wounding of Combatants.

§ 108. Every combatant may be killed or wounded, whether a simple private or an officer, or even the monarch or a member of his family. Some publicists[1] assert that it is a usage of warfare not to aim at a sovereign or a member of his family. Be that as it may, there is in strict law[2] no rule preventing the killing and wounding of such illustrious persons. But combatants may only be killed or wounded if they are able and willing to fight or to resist capture. Therefore, such combatants as are disabled by sickness or wounds may not be killed. Further, such combatants as lay down arms and surrender or do not resist being made prisoners may neither be killed nor wounded, but must be given quarter. These rules are universally recognised, and are now expressly enacted by article 23 (*c*) of the Hague Regulations, although the fury of battle frequently makes single fighters[3] forget and neglect them.

Refusal of Quarter.

§ 109. However, the rule that quarter must be given has its exceptions. Although it has of late been the customary rule of International Law, and although the Hague Regulations stipulate now expressly by article 23 (*d*) that belligerents are prohibited from declaring that no quarter will be given, quarter may nevertheless be refused by way of reprisals for violations of the rules of warfare committed by the other

[1] See Klüber, § 245; G. F. Martens, II. § 278; Heffter, § 126.

[2] Says Vattel, III. § 159: "Mais ce n'est point une loi de la guerre d'épargner en toute rencontre la personne du roi ennemi; et on n'y est obligé que quand on a la facilité de le faire prisonnier." The example of Charles XII. of Sweden (quoted by Vattel), who was intentionally fired at by the defenders of the fortress of Thorn, besieged by him, and who said that the defenders were in their right, ought to settle the point.

[3] See Baty, International Law in South Africa (1900), pp. 84–85.

side; and, further, in case of imperative necessity, when the granting of quarter would so encumber a force with prisoners that its own security would thereby be vitally imperilled. But it must be emphasised that the mere fact that numerous prisoners cannot safely be guarded and fed by the captors[1] does not furnish an exceptional case to the rule, provided that no vital danger for the captors is therein involved. And it must likewise be emphasised that the former rule is now obsolete according to which quarter could be refused to the garrison of a fortress carried by assault, to the defenders of an unfortified place against an attack of artillery, and to the weak garrison who obstinately and uselessly persevered in defending a fortified place against overwhelming enemy forces.

Lawful and Unlawful Means of killing and wounding Combatants.

§ 110. Apart from such means as are expressly prohibited by treaties or custom, all means of killing and wounding that exist or may be invented are lawful. And it matters not whether the means used are directed against single individuals, as swords and rifles, or against large bodies of individuals, as, for instance, shrapnel, Gatlings, and mines. On the other hand, all means are unlawful that render death inevitable or that needlessly aggravate the sufferings of wounded combatants. A customary rule of International Law, now expressly enacted by article 23 (*e*) of the Hague Regulations, prohibits, therefore, the employment of poison and of such arms, projectiles, and material as cause unnecessary injury. Accordingly: wells, pumps, rivers, and the like from which the enemy draws drinking water must not be poisoned; poisoned weapons must not be made use of; rifles

[1] Accordingly, the Boers frequently during the South African War set British soldiers free whom they had captured.

must not be loaded with bits of glass, irregularly shaped iron, nails, and the like; cannons must not be loaded with chain shot, crossbar shot, red-hot balls, and the like. Another customary rule, now likewise enacted by article 23 (*f*) of the Hague Regulations, prohibits the killing and wounding of combatants in a treacherous way. Accordingly: no assassin must be hired and no assassination of combatants be committed; no putting of price on the head of an enemy individual is allowed; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted.

Explosive Bullets.

§ 111. In 1868 a conference met at St. Petersburg for the examination of a Russian proposition with regard to the use of explosive projectiles in war. The representatives of seventeen Powers—namely, Great Britain, Russia, Austria-Hungary, Bavaria, Belgium, Denmark, France, Greece, Holland, Italy, Persia, Portugal, Prussia and the North German Confederation, Sweden-Norway, Switzerland, Turkey, and Wurtemburg (Brazil acceded later on) signed on November 29, 1868, the so-called Declaration of St. Petersburg,[1] which stipulates that the signatory Powers and those who should accede later on renounce in case of war between themselves the employment by their military and naval troops of any projectile of a weight below 400 grammes (14 ounces) which is either explosive or charged with fulminating or inflammable substances. This engagement is obligatory only upon the contracting Powers, and it ceases to be obligatory in case a non-contracting Power takes part in a war between any of the contracting Powers.

[1] See above, Vol. I. § 562, Martens, N.R.G. XVIII. p. 474.

Expanding (Dum-Dum) Bullets.

§ 112. As Great Britain had introduced bullets manufactured at the Indian arsenal of Dum-Dum, near Calcutta, the hard jacket of which did not quite cover the core and which therefore easily expanded and flattened in the human body, the Hague Conference adopted a declaration[1] signed on July 29, 1899, by twenty-three Powers — namely, Austria-Hungary, Germany, Belgium, Denmark, Spain, China, Japan, Mexico, France, Greece, Montenegro, Holland, Persia, Italy, Roumania, Russia, Siam, Servia, Spain, Sweden-Norway, Switzerland, Turkey, and Bulgaria — stipulating that the contracting Powers abstain, in case of war between two or more of them, from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions. Although Great Britain did not sign the Declaration, the British Government withdrew the Dum-Dum bullets during the South African War. And it is to be taken for certain that Great Britain will not in future make use of them in a war with civilised Powers.

Projectiles and Explosives launched from Balloons.

§ 113. The Hague Conference adopted a Declaration,[2] signed on July 29, 1899, by twenty-five Powers—namely, Austria-Hungary, Germany, Luxemburg, Belgium, Denmark, Spain, the United States of America, China, Mexico, France, Greece, Italy, Japan, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden-Norway, Switzerland, Turkey, and Bulgaria—stipulating for a term of five years the prohibition in a war between two or more of the signatory Powers against the launching of projectiles or explosives from balloons or by other methods of a similar nature. This Declaration, not being renewed before the end of five years, expired in July 1904. But a similar Declaration will very likely take its place in the future.

[1] See Martens, N.R.G., 2nd ser. XXVI. p. 1002.

[2] See Martens, N.R.G. 2nd ser. XXVI. p. 994.

Projectiles diffusing Asphyxiating or Deleterious Gases.

§ 114. The Hague Conference also adopted a Declaration,[1] signed on July 29, 1899, by twenty-four Powers—namely, Austria-Hungary, Germany, Luxemburg, Belgium, Denmark, Spain, Mexico, France, Greece, China, Italy, Japan, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden-Norway, Switzerland, Turkey, and Bulgaria—stipulating that the signatory Powers should in a war between two or more of them abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases. This Declaration had the same fate as that concerning projectiles launched from balloons, since it expired in 1904. But its place will probably be taken in the future by a similar Declaration.

Violence against Non-combatant Members of Armed Forces.

§ 115. It will be remembered from above, § 79, that numerous individuals belong to the armed forces without being combatants. Now, since and in so far as these non-combatant members of armed forces do not take part in the fighting, they may not directly be attacked and killed or wounded. However, they are exposed to all injuries indirectly resulting from the operations of warfare. And with the exception of doctors, chaplains, persons employed in military hospitals, official ambulance men, and the like, who according to articles 2 and 3 of the Geneva Convention enjoy the privilege of neutrality,[2] such non-combatant members of armed forces can certainly be made prisoners, since the assistance they give to the fighting forces may be of great importance.

Violence against Private Enemy Persons.

§ 116. Whereas in former times private enemy persons of either sex could be killed or otherwise badly treated according to discretion, and whereas in especial the inhabitants of fortified places taken by assault used to be abandoned to the mercy of the assailants, it became in the eighteenth century a universally recognised customary rule of the Law

[1] See Martens, N.R.G., 2nd ser. p. 998.

[2] See below, § 121.

of Nations that private enemy individuals should not be killed or attacked. In so far as they do not take part in the fighting, they may not be directly attacked and killed or wounded. They are, however, like non-combatant members of the armed forces, exposed to all injuries indirectly resulting from the operations of warfare. Thus, for instance, when a town is bombarded and thousands of inhabitants are thereby killed, or when a train carrying private individuals as well as soldiers is wrecked by a mine, no violation of the rule prohibiting attack on private enemy persons has taken place.

As regards captivity, the rule is that private enemy persons may not be made prisoners of war. But this rule has exceptions conditioned by the carrying out of certain military operations, the safety of the armed forces, the order and tranquillity of occupied enemy territory. Thus, for instance, influential enemy citizens who try to incite their fellow-citizens to take up arms can be arrested and deported into captivity. And even the whole population of a province may be imprisoned in case a levy *en masse* is threatening.

Apart from captivity, restrictions of all sorts may be imposed upon and means of force may be applied against private enemy persons for many purposes. Such purposes are:—the keeping of order and tranquillity on occupied enemy territory; the prevention of any hostile conduct, especially conspiracies; the prevention of intercourse with and assistance to the enemy forces; the securing of the fulfilment of the commands and requests of the military authorities, such as for the provision of guides, drivers, hostages, farriers; the securing of the compliance with requisitions and contributions, of the execution of public works necessary for military operations, such as the building

of fortifications, roads, bridges, soldiers' quarters, and the like. What kind of violent means may be applied for these purposes is in the discretion of the respective military authorities, who on their part will act according to expediency and the rules of martial law established by the belligerents. But there is no doubt that, if necessary, capital punishment and imprisonment [1] are lawful means for these purposes. The essence of the position of private individuals in modern warfare with regard to violence against them finds expression in article 46 of the Hague Regulations, which lays down the rule that "family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected."

Violence against the Head of the Enemy State and against Officials in Important Positions.

§ 117. The head of the enemy State and officials in important positions who do not belong to the armed forces occupy a similar position to private enemy persons in their liability to direct attack, death, or wounds. But they are so important for the enemy State, and they may be so useful for the enemy and so dangerous to the invading forces, that they can certainly be made prisoners of war. If belligerents can get hold of each other's heads of States and Cabinet Ministers, they will certainly remove them into captivity. And they can do the same with diplomatic agents and other officials of importance, because by weakening the enemy Government they may thereby influence the enemy to agree to terms of peace.

[1] That in case of general devastation the peaceful population may be detained in so-called concentration camps, there is no doubt; see below, § 154. And there is likewise no doubt that hostages may be taken out of the peaceful population; see below, p. 176, note 3, and p. 273, note 2.

III

Treatment of Wounded, and Dead Bodies

Hall, § 130—Lawrence, § 188—Maine, pp. 156–159—Manning, pp. 205—Phillimore, III. § 95—Halleck, II. pp. 36–39—Taylor, §§ 527–528—Bluntschli, §§ 586–592—Lueder in Holtzendorff, IV. pp. 289–319, 398–421—Liszt, § 40, V.—Ullmann, § 151 and in R.G. IV. (1897), pp. 437–447—Bonfils, Nos. 1108–1118—Despagnet, Nos. 551–554—Pradier-Fodéré, VI. No. 2794, VII. Nos. 2849–2881—Rivier, II. pp. 268–273—Calvo, IV. §§ 2161–2165—Fiore, III. Nos. 1363–1372—Martens, II. § 114—Longuet, §§ 85–90—Mérignhac, pp. 114–142—Pillet, pp. 165–192—Kriegsgebrauch, p. 26—Holland, Studies, pp. 61–65—Holland, War, Nos. 45–54—Lueder, "Die Genfer Convention" (1876)—Moynier, "La croix rouge, son passé et son avenir" (1882); "La revision de la Convention de Genève" (1898); "La fondation de la croix rouge" (1903)—Buzzati, "De l'emploi abusif . . . de la croix rouge" (1890)—Triepel, "Die neuesten Fortschritte auf dem Gebiet des Kriegsrechts" (1894), pp. 1–41—Müller, "Entstehungsgeschichte des rothen Kreuzes und der Genfer Konvention" (1897)—Münzel, "Untersuchungen über die Genfer Konvention" (1901)—Roszkoroski in R.I., 2nd ser. IV. (1902), pp. 199, 299, 442—Gillot, "La revision de la Convention de Genève, etc." (1902).

Origin of Geneva Convention.

§ 118. Although since the seventeenth century several hundreds of special treaties have been concluded between single States regarding the tending of each other's wounded and the exemption of army surgeons from captivity, no other general rule of the Law of Nations was in existence before the second half of the nineteenth century than this, that the wounded must not be killed, mutilated, or otherwise ill-used. A change for the better was initiated by Jean Henry Dunant, a Swiss citizen from Geneva, who was an eye-witness of the battle of Solferino in 1859, where many thousands of wounded died who could under more favourable circumstances have been saved. When he published, in 1862, his pamphlet, "Un Souvenir de Solférino," the Geneva

Société d'utilité publique, under the presidency of Gustave Moynier, created an agitation in favour of better arrangements for the tending of the wounded on the battlefield, and convoked an international congress at Geneva in 1863, where thirty-six representatives of nearly all the European States met and discussed the matter. In 1864 the Bundesrath, the Government of the Federal State of Switzerland, took the matter officially in hand and invited all European and several American States to send official representatives to a Congress at Geneva for the purpose of discussing and concluding an international treaty regarding the wounded. This Congress met in 1864, and sixteen States were represented. Its result is the international "Convention[1] for the Amelioration of the Condition of Soldiers wounded in Armies in the Field," commonly called "Geneva Convention," signed on August 22, 1864. By-and-by other States than the original signatories joined the Convention. At present the whole body of the civilised States of the world, with the exception of Brazil, Colombia, Costa Rica, Cuba, San Domingo, Ecuador, Haiti, Monaco, Lichtenstein, and Panama, are parties, and it may, therefore, be maintained that its contents are generally recognised International Law. That the rules of the Convention are in no wise perfect, and need supplementing regarding many points, became soon apparent. A second International Congress met at the invitation of Switzerland in 1868 at Geneva, where additional articles[2] to the original Convention were discussed and signed. These additional articles have, however, never been ratified. The Hague Peace

[1] See Martens, N.R.G., XVIII. p. 607, and above, Vol. I. § 560, where the States that have become parties are enumerated.

[2] See Martens, N.R.G., XVIII p. 61.

Conference in 1899 unanimously formulated the wish that Switzerland should shortly take steps for the assembly of another international congress for the purpose of revising the Geneva Convention. And the Swiss Bundesrath invited a Congress to meet again at Geneva in September, 1903, but this Congress has been postponed. The original Convention is, therefore, still the basis of the present treatment of wounded.

It consists of ten articles, and not only provides rules for the treatment of wounded, but, in the interest of a proper treatment of the wounded, supplies also rules regarding ambulances, military hospitals, the army medical staff, chaplains, orderlies, ambulance men, inhabitants assisting the wounded, and, lastly, an emblem of distinction. Article 21 of the Hague Regulations expressly confirms the Geneva Convention, and the few important States that have not yet become parties to the Geneva Convention will, therefore, become parties in future *ipso facto* by acceding to the Hague Regulations, since article 21 thereof enacts categorically that belligerents[1] are bound by the Geneva Convention or any future modification thereof.

The Wounded and the Sick.

§ 119. According to article 6 of the Geneva Convention[2] the collection of the wounded and their tending must take place without distinction of parties. Evacuation of hospitals, together with the persons under whose directions the evacuation takes

[1] Thus Mexico, although she did not expressly accede to the Geneva Convention before 1905, indirectly became a party to it in 1899 through becoming a party to the Hague Regulations.

[2] The Geneva Convention has in its separate stipulations been severely criticised by humanitarians as well as military men, and several proposals for its improvement have been made. It cannot be the task of a treatise to reproduce these criticisms, but readers who take an interest in the matter will find the necessary information in the monographs quoted above at the commencement of § 118.

place, shall be protected by an absolute neutrality. With consent of both parties, and when circumstances permit it, commanders-in-chief have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement. Those wounded enemy soldiers who are not thus delivered back and who, after their wounds are healed, are recognised as unfit for further military service, must be sent back to their country at once. According to article 5 of the unratified additional articles of 1868 even those wounded who are not unfit for further service, superior officers excepted, are to be sent back to their country on parole.

Ambulances and Military Hospitals.

§ 120. Ambulances and military hospitals, as long as any sick or wounded are therein, are considered neutral and must be protected and respected by the belligerents, but their neutrality ceases in case an ambulance or hospital should be held by a military force (Geneva Convention, article 1). Whereas the equipment of military hospitals may be appropriated by an enemy for the purpose of tending the wounded generally, the equipment of ambulances is as immune from seizure as the ambulances themselves (Geneva Convention, article 4). According to article 3 of the unratified additional articles of 1868 field hospitals and other temporary establishments which follow the troops on the field of battle to give temporary help to the sick and wounded are to enjoy the same privileges as ambulances.

Army Medical Staff, and the like.

§ 121. All persons employed in hospitals and ambulances, whether doctors, chaplains, or ambulance men, or members of the staff for superintendence and administration, enjoy perfect neutrality whilst so employed and so long as there remain any wounded to bring in or to succour (Geneva Convention, article 2).

After occupation of the territory by the enemy, all these persons may either continue to fulfil their duties in the hospital or ambulance they belong to, or withdraw in perfect freedom for the purpose of rejoining the forces to which they belong. If they choose the latter, they must be delivered up by the occupant to the outposts of the enemy (Geneva Convention, article 3), and they can carry away all their private property and, further, their ambulances together with equipment (article 3). According to article 1 of the unratified additional articles of 1868, such persons shall be obliged to continue to fulfil their duties when necessary, even after occupation of a territory, and, when they make a demand to withdraw, the commander of the occupying forces shall fix the moment of their departure, which, except in case of military necessity, cannot under any circumstances be delayed.

Inhabitants nursing the Wounded.

§ 122. Inhabitants who bring help to the wounded must be respected and remain free. If they receive and nurse wounded in their houses, the houses shall thereby enjoy special protection, and the inhabitants shall be exempted[1] from the quartering of troops as well as from a part of the contributions of war that may be imposed (Geneva Convention, article 5). Article 4 of the unratified additional articles of 1868 contains an interpretation of this rule, explaining that, as regards the quartering of troops and contributions of war, account will only be taken in an equitable degree of the charitable zeal exhibited by inhabitants.

Distinctive Emblem.

§ 123. Hospitals, ambulances, and evacuations must fly, together with their national flags, a white flag with a red cross, and the persons who are

[1] See below, §§ 147 and 148.

neutralised on account of their services to hospitals and the like are allowed to wear white arm badges with a red cross (Geneva Convention, article 7). Although the Geneva Convention stipulates expressly the red cross as its distinctive emblem, the parties do not object to non-Christian States who object to the cross on religious grounds adopting another emblem. Thus Turkey has substituted a red half-moon, and Persia a red sun for the cross.[1]

Treatment of Dead Bodies.

§ 124. According to a customary rule of the Law of Nations belligerents have the right to demand from each other that dead bodies of their soldiers shall not be disgracefully treated, especially not mutilated, and shall as far as possible be collected and buried[2] by the victor on the battlefield. Pieces of equipment found upon such bodies are public enemy property and may, therefore, be appropriated as booty[3] by the victor. But money, jewellery, and other valuables found upon them, which are apparently private property, are not booty, and must, according to article 14 of the Hague Regulations, be handed over to the Bureau of Information[4] relative to the prisoners of war, which has to transmit them to those interested.

[1] See below, § 207.

[2] See Grotius, II. c. 19, §§ 1 and 3. Regarding a valuable suggestion of Ullmann's concerning sanitary measures for the purpose of avoiding epidemics, see above, Vol. I. § 588, note 5.

[3] See below, § 139.

[4] See below, § 130.

IV

Captivity

Grotius, III. c. 14—Bynkershoek, Quaest. jur. publ. I. c. 3—Vattel, III. §§ 148-154—Hall, §§ 131-134—Lawrence, § 187—Maine, pp. 160-167—Manning, pp. 210-222—Phillimore, III. § 95—Twiss, II. § 177—Halleck, II. pp. 19-30—Taylor, §§ 519-524—Wharton, III. §§ 348-348D—Wheaton, § 344—Bluntschli, §§ 593-626—Heffter, §§ 127-129—Lueder in Holtzendorff, IV. pp. 423-445—Ullmann, § 150—Bonfils, Nos. 1119-1140—Despagnet, Nos. 545-550—Pradier-Fodéré, VII. Nos. 2796-2842—Rivier, II. pp. 273-279—Calvo, IV. §§ 2133-2157—Fiore, III. Nos. 1355-1362—Martens, II. § 113—Longuet, §§ 77-83—Mérignhac, pp. 87-113—Pillet, pp. 145-164—Kriegsgebrauch, pp. 11-18—Holland, War, Nos. 28-44—Eichelmann, "Über die Kriegsgefangenschaft" (1878)—Romberg, "Des belligérants et des prisonniers de guerre" (1894)—Triepel, "Die neuesten Fortschritte auf dem Gebiet des Kriegsrechts" (1894), pp. 41-55—Holls, "The Peace Conference at the Hague" (1900), pp. 145-151—Cros, "Condition et traitement des prisonniers de guerre" (1900).

Development of International Law regarding Captivity.

§ 125. During antiquity, prisoners of war could be killed, and they were very often at once actually butchered or offered as sacrifices to the gods. If they were spared, they were regularly made slaves and only exceptionally liberated. But belligerents also exchanged their prisoners or liberated them for ransom. During the first part of the Middle Ages prisoners of war could likewise be killed or made slaves. Under the influence of Christendom, however, their fate became by-and-by mitigated. Although they were often most cruelly treated, they were, during the second part of the Middle Ages, usually no longer killed and, with the disappearance of slavery in Europe, no longer enslaved. At the time when modern International Law gradually came into existence, killing and enslaving of prisoners of war had disappeared, but they were often treated like criminals and as an object of personal revenge.

They were not considered in the power of the State whose forces captured them, but in the power of those very forces or the single soldiers that had made the capture. And it was considered lawful on the part of captors to make as much profit as possible out of their prisoners by way of ransom, provided no exchange of prisoners took place. So general was this practice that a more or less definite scale of ransom became usual. Thus, Grotius (III. c. 14, § 9) mentions that in his time the ransom of a private was the amount of his one month's pay. And since the pecuniary value of a prisoner as regards ransom rose in proportion with his fortune and his position in life and in the enemy army, it became usual that prisoners of rank and note did not belong to the capturing forces but to the Sovereign, who had, however, to recompense the captors. During the seventeenth century, the custom that prisoners were considered in the power of their captors died away. They were now considered in the power of the respective Sovereign whose forces had captured them. But rules of the Law of Nations regarding their proper treatment were hardly in existence. The practice of liberating prisoners in exchange or for ransom only continued. Special cartels were often concluded at the outbreak of or during the war for the purpose of stipulating a scale of ransom according to which either belligerent could redeem his soldiers and officers from captivity. The last[1] instance of such cartels is that between England and France in 1780, stipulating the ransom for members of the naval and military forces of both belligerents.

It was not before the eighteenth century, with its general tendencies to mitigate the cruel practices of

[1] See Hall, § 134, p. 428, note 1.

warfare, that matters changed for the better. The conviction became by-and-by general that captivity should only be the means of preventing prisoners from returning to their corps and taking up arms again, and should, as a matter of principle, be distinguished from imprisonment as a punishment for crimes. The Treaty of Friendship[1] concluded in 1785 between Prussia and the United States of America is probably the first that stipulates (article 24) a proper treatment of prisoners of war, prohibiting confinement in convict prisons and the use of irons, and ordering confinement for them in a healthy place, where they can have exercise, and where they are kept and fed as troops. During the nineteenth century the principle that prisoners of war should be treated by the captor analogously to his own troops became generally recognised, and the Hague Regulations have now, by their articles 4 to 20, enacted exhaustive rules regarding captivity.

Treatment of Prisoners of War.

§ 126. According to articles 4–7 and 16–19 of the Hague Regulations prisoners of war are not in the power of the individuals or corps who captured them, but in the power of the Government of the captor. They must be humanely treated. All their personal belongings remain their property, with the exception of arms, horses, and military papers, which are booty.[2] They can be imprisoned as an indispensable matter of safety only. They may, therefore, be detained in a town, fortress, camp, or any other locality, and they may be bound not to go beyond a certain fixed boundary. But they cannot be kept in convict prisons. Their labour may be utilised by the Government according to their rank and aptitude, but their tasks must not be excessive and must have

[1] See Martens, N.R., IV. p. 37. [2] See below, § 144.

nothing to do with the military operations. Work done by them for the State must be paid for in accordance with tariffs in force for soldiers of the national army employed on similar tasks. But prisoners of war may also be authorised to work for the public service or for private persons under conditions of employment to be settled by the military authorities, and they may likewise be authorised to work on their own account. All wages they receive go towards improving their position, and a balance must be paid to them at the time of their release, after deducting the cost of their maintenance. But whether they earn wages or not, the Government is bound under all circumstances to maintain them, and prepare quarters, food, and clothing for them on the same footing as for its own troops. Officer prisoners may, if necessary, receive the full pay allowed to their rank by their country's regulations, the amount to be repaid by their Government. All prisoners of war must enjoy every latitude in the exercise of their religion, including attendance at their own church service, provided only they comply with the regulations for order issued by the military authorities. If prisoners want to make a will, it shall be received by the authorities or drawn up on the same conditions as for soldiers of the national army. And the same rules are valid regarding death certificates and the burial of prisoners of war, due regard to be paid to their grade and rank. Letters, money orders, valuables, and postal parcels destined for or despatched by prisoners of war must enjoy free postage, and gifts and relief in kind for prisoners of war must be admitted free from all custom and other duties as well as payments for carriage by Government railways (article 16).

Who may claim to be Prisoners of War.

§ 127. Every individual who is deprived of his liberty not for a crime but for military reasons has a claim to be treated as a prisoner of war. Article 13 of the Hague Regulations enacts expressly that non-combatant[1] members of the armed forces, such as newspaper correspondents, reporters, sutlers, contractors, who are captured and retained, can claim to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying. But although the Hague Regulations do not contain anything regarding the treatment of private enemy individuals and enemy officials whom a belligerent thinks it necessary[2] to make prisoners of war, it is evident that they can claim all privileges of such prisoners. Such individuals are not convicts; they are taken into captivity for military reasons, and they are therefore prisoners of war.

Discipline.

§ 128. Articles 8 and 9 of the Hague Regulations lay down the discipline over prisoners of war in the following way:—Every prisoner who, if questioned, does not declare his true name and rank is liable to a curtailment of the advantages accorded to prisoners of his class. All prisoners are subject to the laws, regulations, and orders in force in the army of the belligerent that keeps them in captivity. Any act of insubordination on the part of prisoners can be punished in accordance with these laws.[3] And apart from this, all kinds of severe measures are admissible to prevent further similar acts. Escaped prisoners, who, after having rejoined the army, are again taken prisoners, are not liable to any punishment for their

[1] See above, § 79.
[2] See above, §§ 116 and 117.
[3] Concerning the question whether after conclusion of peace such prisoners may be retained as are undergoing a term of imprisonment for disciplinary offences, see below, § 275.

flight. But if they are recaptured before they succeed in rejoining their army, or before they quitted the territory occupied by the capturing forces, they are liable to disciplinary punishment.

Release on Parole.

§ 129. Articles 10 to 12 of the Hague Regulations deal with release on parole in the following manner:— No belligerent is obliged to assent to a prisoner's request to be released on parole, and no prisoner can be forced to accept such release. But if the laws of his country authorise him to do so, and if he acquiesces, any prisoner may be released on parole. In such case he is in honour bound scrupulously to fulfil the engagement he has contracted, both as regards his own Government and the Government that released him. And his own Government is formally bound neither to request of nor to accept from him any service incompatible with the parole given. Any prisoner released on parole and recaptured bearing arms against the belligerent who released him, or against such belligerent's allies, forfeits the privilege to be treated as prisoner of war, and can be tried by court-martial. The Hague Regulations do not lay down the punishment for such breach of parole, but according to a customary rule of International Law the punishment may be capital.

Bureau of Information.

§ 130. According to articles 14 and 16 of the Hague Regulations every belligerent must institute on the commencement of war a Bureau of Information relative to his prisoners of war. This Bureau is intended to answer all inquiries about prisoners. It must be furnished by all the services concerned with all the necessary information to enable it to keep an individual return for each prisoner. It must be kept informed of internments and changes as well as of admissions into hospital and of deaths.

The Bureau must likewise receive and collect all objects of personal use, valuables, letters, and the like, found on battlefields [1] or left by prisoners who have died in hospital or ambulance, and must transmit these articles to those interested. The Bureau must enjoy the privilege of free postage.

Relief Societies.

§ 131. A new and valuable rule, taken from the Brussels Declaration, is that of article 15 of the Hague Regulations making it a duty of every belligerent to grant facilities to Relief Societies for prisoners of war with the object of serving as the intermediary for charity. The condition of the admission of such societies and their agents is that the former are regularly constituted in accordance with the law of their country. Delegates of such societies may be admitted to the places of internment for the distribution of relief, as also to the halting-places of repatriated prisoners, through a personal permit of the military authorities, provided they give an engagement in writing that they will comply with all regulations by the authorities for order and police.

End of Captivity.

§ 132. Captivity can come to an end through different modes. Apart from release on parole, which has already been mentioned, captivity comes to an end—(1) through simple release without parole; (2) through successful flight; (3) through liberation by the invading enemy to whose army the respective prisoners belong; (4) through exchange for prisoners taken by the enemy; (5) through prisoners [2] being brought into neutral territory by captors who take refuge there; and, lastly (6), through the war coming to an end. Release of prisoners for ransom is no longer practised, except in the case of the crew of a captured merchantman released on a ransom bill.[3]

[1] See above, § 124. [2] See below, § 337. [3] See below, § 195.

It ought, however, to be observed that the practice of ransoming prisoners might be revived if convenient, provided the ransom is to be paid not to the individual captor but to the belligerent whose forces made the capture.

As regards the end of captivity through the war coming to an end, a distinction must be made according to the different modes of ending war. If the war ends by peace being concluded, captivity comes to an end at once [1] with the conclusion of peace, and, as article 20 of the Hague Regulations expressly enacts, the repatriation of prisoners must be effected as speedily as possible. If, however, the war ends through conquest and annexation of the vanquished State, captivity comes to an end as soon as peace is established. It ought to end with annexation, and it will in most cases do so. But as guerilla war may well go on after conquest and annexation, and thus prevent a condition of peace from being established, although real warfare is over, it is necessary not to confound annexation with peace.[2] The point is of interest regarding such prisoners only as are subjects of neutral States. For other prisoners become through annexation subjects of the State that keeps them in captivity, and such State is, therefore, as far as International Law is concerned, unrestricted in taking any measure it likes with regard to them. It can repatriate them, and it will in most cases do so. But if it thinks that they might endanger its hold over the conquered territory, it might likewise prevent their repatriation for any definite or indefinite period.[3]

[1] That nevertheless the prisoners remain under the discipline of the captor until they have been handed over to the authorities of their home State, will be shown below, § 275.

[2] See above, § 60.

[3] Thus, after the South African War, Great Britain refused to repatriate all those prisoners of war who on their part refused to take the oath of allegiance.

V

Appropriation and Utilisation of Public Enemy Property

Grotius, III. c. 5—Vattel, III. §§ 73, 160–164—Hall, §§ 136–138—Lawrence, § 195—Maine, pp. 192–206—Manning, pp. 179–183—Twiss, II. §§ 62–71—Halleck, II. pp. 58–68—Taylor, §§ 529–536—Wharton, III. § 340—Wheaton, §§ 346, 352–354—Bluntschli, §§ 644–651A—Heffter, §§ 130–136—Lueder in Holtzendorff, IV. pp. 488–500—G. F. Martens, II. §§ 279–280—Ullmann, § 155—Bonfils, Nos. 1176–1193—Despagnet, Nos. 590–602—Pradier-Fodéré, VII. Nos. 2989–3018—Rivier, II. pp. 306–314—Calvo, IV. §§ 2199–2214—Fiore, III. Nos. 1389, 1392, 1393, 1470—Martens, II. § 120—Longuet, § 96—Mérignhac, pp. 299–316—Pillet, pp. 319–340—Kriegsgebrauch, pp. 57–60—Holland, War, Nos. 74, 78–81—Rouard de Card, "La guerre continentale et la propriété" (1877)—Bluntschli, "Das Beuterecht im Krieg, und das Seebeuterecht insbesondere" (1878)—Depambour, "Des effets de l'occupation en temps de guerre sur la propriété et la jouissance des biens publics et particuliers" (1900).

Appropriation of all the Enemy Property no longer admissible.

§ 133. Under a former rule of International Law belligerents could appropriate all public and private [1] enemy property they found on enemy territory. This rule is now obsolete. Its place is taken by several rules, since distinctions are to be made between moveable and immoveable property, public and private property, and, further, between different kinds of private and public property. These rules must be discussed *seriatim*.

Immoveable Public Property.

§ 134. Appropriation of public immoveables is not

[1] It is impossible for a treatise to go into historical details, and to show the gradual disappearance of the old rule. But it is of importance to state the fact, that even during the nineteenth century—see, for instance, G. F. Martens, II. § 280; Twiss, II. § 64; Hall, § 139—it was asserted that in strict law all private enemy moveable property was as much booty as public property, although the growth of a usage was recognised which under certain conditions exempted it from appropriation. In the face of articles 46 and 47 of the Hague Regulations these assertions have no longer any basis, and all the text-books of the nineteenth century are now antiquated with regard to this matter.

lawful as long as the territory on which they are has not become State property of the invader through annexation. During mere military occupation of the enemy territory, a belligerent cannot sell or otherwise alienate public enemy land and buildings, but only appropriate the produce of them. Article 55 of the Hague Regulations stipulates expressly that a belligerent occupying enemy territory shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State and situated on the occupied territory; that he must protect the stock and plant, and that he must administer them according to the rules of usufruct. He can, therefore, sell the crop from public land, cut timber in the public forests and sell it, can let public land and buildings for the time of his occupation, and the like. He is, however, only usufructuary, and he is, therefore, prohibited from exercising his right in a wasteful or negligent way that decreases the value of the stock and plant. Thus, he must, for instance, not cut down a whole forest unless the necessities of war compel him.

Immoveable Property of Municipalities, and of Religious, Charitable, and the like Institutions.

§ 135. It must, however, be observed that the produce of such public immoveables only as belong to the State itself may be appropriated, but not the produce of those belonging to municipalities and of those which, although they belong to the hostile State, are permanently set aside for religious purposes, for the maintenance of charitable and educational institutions, and for the benefit of art and science. Article 56 of the Hague Regulations stipulates expressly that such property is to be treated as private property.

§ 136. As far as the necessities of war demand,

a belligerent can make use of public enemy buildings for all kinds of purposes. Troops must be housed, horses stabled, the sick and wounded nursed. Public buildings may in the first instance, therefore, be made use of for such purposes, although they may thereby be considerably damaged. And it matters not whether the buildings belong to the enemy State or to municipalities, whether they are regularly destined for ordinary governmental and municipal purposes, or for religious, educational, scientific, and the like purposes. Thus, churches may be converted into hospitals, schools into barracks, buildings used for scientific research into stables. But it must be observed that such utilisation of public buildings as damages them is justified only if it is necessary. A belligerent who turns a picture gallery into stables without being compelled thereto would certainly commit a violation of the Law of Nations.

Utilisation of Public Buildings.

§ 137. Moveable public enemy property can certainly be appropriated by a belligerent provided that it may directly or indirectly be useful for military operations. Article 53 of the Hague Regulations enacts exhaustively that a belligerent occupying hostile territory can take possession of the cash, funds, realisable[1] securities, depôts of arms, means of transport, stores, supplies, and of all other moveable property of the hostile State which may be used for military operations. Thus, a belligerent is entitled to seize not only the money and funds of the hostile State on the one hand, and, on the other, munitions of war, depôts of arms, stores and supplies, but also

Moveable Public Property.

[1] The French text of article 53 speaks of "valeurs exigibles," which the official British text renders into English as "property liable to requisition," but which I prefer to translate as "realisable securities." Holland, War, No. 78, agrees with my translation.

the rolling-stock of public railways and other means of transport and everything and anything he can directly or indirectly make use of for military operations. He can, for instance, seize a quantity of cloth for the purpose of clothing his soldiers.

Moveable Property of Municipalities and of Religious, Charitable, and the like Institutions.

§ 138. But the like exceptions as regards the usufruct of public immoveables are valid for the appropriation of public moveables. Article 56 of the Hague Regulations enumerates the property of municipalities, of religious, charitable, educational institutions, and of those of science and art. Thus the moveable property of churches, hospitals, schools, universities, museums, picture galleries, even when belonging to the hostile State, is exempt from appropriation by a belligerent. As regards archives, they are no doubt institutions for science, but a belligerent may nevertheless seize such State papers deposited therein as are of importance to him in connection with the war. The last instances of the former practice are presented by Napoleon I., who seized works of art during his numerous wars and had them brought to the galleries of Paris. But they had to be restored to their former owners in 1815.

Booty on the Battlefield.

§ 139. Different from the case of moveable enemy property found by an invading belligerent on enemy territory is the case of moveable enemy property on the battlefield. According to a former rule of the Law of Nations all enemy property, be it public or private, which a belligerent could get hold of on the battlefield was booty and could be appropriated. Although some publicists [1] who wrote before the Hague Peace Conference of 1899 still teach the validity of this rule, it is obvious from articles 4 and 14 of the

[1] See, for instance, Halleck, II. p. 73, and Heffter, § 135.

Hague Regulations that it is now obsolete as regards *private*[1] enemy property except arms, pieces of equipment, and the like. But as regards *public* enemy property this customary rule is still valid. Thus weapons, munition, and valuable pieces of equipment which are found upon the dead, the wounded, and the prisoners, whether they are public or private property, may be seized, as may also the war-chest and State papers in possession of a captured commander, enemy horses, batteries, carts, and everything else that is of value. To whom the booty ultimately belongs is not for International but for Municipal Law[2] to determine, since International Law simply says that public enemy property on the battlefield can be appropriated by belligerents. And it must be specially observed that the restriction of article 53 of the Hague Regulations[3] does not find application in the case of moveable property found on the battlefield. For such property may be appropriated, whether it may be used for military operations or not; the mere fact that it was seized on the battlefield entitles a belligerent to appropriate it.

[1] See above, § 124, and below, § 144.

[2] According to British law all booty belongs to the Crown. (See Twiss, II. §§ 64 and 71.)

[3] Article 53 speaks of "an army of occupation" only, and therefore does not concern belligerents on the battlefield.

VI

Appropriation and Utilisation of Private Enemy Property

Grotius, III. c. 5—Vattel, III. §§ 73, 160-164—Hall, §§ 139, 141-144—Lawrence, §§ 196-199—Maine, pp. 192-206—Manning, pp. 179-183—Twiss, II. §§ 62-71—Halleck, II. pp. 73-75—Taylor, §§ 529, 532, 537—Wharton, III. § 338—Wheaton, § 355—Bluntschli, §§ 652, 656-659—Heffter, §§ 130-136—Lueder in Holtzendorff, IV. pp. 488-500—G. F. Martens, II. §§ 279-280—Ullmann, § 155—Bonfils, Nos. 1194-1206—Despagnet, Nos. 578-589—Pradier-Fodéré, VII. Nos. 3032-3047—Rivier, II. pp. 318-329—Calvo, IV. §§ 2220-2229—Fiore, III. Nos. 1391, 1392, 1472—Martens, II. § 120—Longuet, §§ 97, 98—Mérignhac, pp. 263-268—Pillet, pp. 319-340—Kriegsgebrauch, pp. 53-56—Holland, War, Nos. 72-73.—See also the monographs of Rouard de Card, Bluntschli, and Depambour, quoted above at the commencement of § 133.

Immoveable Private Property

§ 140. Immoveable private enemy property can under no circumstances and conditions be appropriated by an invading belligerent. If he were nevertheless to confiscate and sell private land or buildings, the buyer would acquire no right[1] whatever to the property. Article 46 of the Hague Regulations enacts expressly that "private property cannot be confiscated." But different from confiscation is the temporary use of private land and buildings for all kinds of purposes demanded by the necessities of war. What has been said above in § 136 with regard to utilisation of public buildings finds equal application[2] to private buildings. If necessary, they may be converted into hospitals, barracks, and stables without indemnification of the proprietors, and they may also be converted into fortifications. A humane belligerent will not drive

[1] See below, § 283.

[2] The Hague Regulations do not mention this; they simply enact in article 46 that private property must be "respected," and cannot be confiscated.

the wretched inhabitants into the street if he can help it. But under the pressure of necessity he may be obliged to do this, and he is certainly not prohibited from doing it.

Private War Material and Means of Transport.

§ 141. All kinds of private moveable property which can serve as war material, such as arms, ammunition, cloth for uniforms, leather for boots, saddles, and, further, all private means of transport and communication, such as railway rolling-stock, ships, telegraphs, telephones, carts, and horses, may be seized and made use of for military purposes by an invading belligerent, but they must be restored at the conclusion of peace, and indemnities must be paid for them. This is expressly enacted by article 53 of the Hague Regulations, and although carts and horses are not there enumerated, I have no doubt that they belong to the articles which may be so seized. It is evident that the seizure of such material must be duly acknowledged by receipt, although article 53 does not say so, for otherwise how could "indemnities be paid after the conclusion of peace"? As regards the question who is to pay the indemnities, Holland (War, No. 78) correctly maintains that "the Treaty of Peace must settle upon whom the burden of making compensation is ultimately to fall."

Works of Art and Science, Historical Monuments.

§ 142. On the other hand, works of art and science and, further, historical monuments may under no circumstances and conditions be appropriated or made use of for military operations. Article 56 of the Hague Regulations enacts categorically that "all seizure" of such works and monuments is prohibited. Therefore, although the metal a statue is cast of may be of the greatest value for cannons, it must not be touched.

Other Private Personal Property.

§ 143. Private personal property which does not consist of war material and means of transport serviceable to military operations can regularly not be seized.[1] Articles 6 and 7 of the Hague Regulations stipulate expressly that "private property cannot be confiscated," and "pillage is formally prohibited." But it must be emphasised that these rules have in a sense exceptions, demanded and justified by the necessities of war. Men and horses must be fed, men must protect themselves against the weather. If there is no time for ordinary requisitions[2] to provide food, forage, clothing, and fuel, or if the inhabitants of a locality have fled so that ordinary requisitions cannot be made, a belligerent must take these articles wherever he can get hold of them, and he is justified[3] in doing so. And it must be further emphasised that quartering[4] of soldiers who, together with their horses, must be well fed by the inhabitants of the respective houses, is likewise lawful, although it may be ruinous to the private individuals concerned.

Booty on the Battlefield.

§ 144. Private enemy property on the battlefield is no longer in every case an object of booty.[5] Saddles, horses, munitions, and especially arms, may indeed be appropriated,[6] even if they are private property, as may also private means of transport, such as carts and other vehicles which an enemy has made use of. But cash, jewellery and other articles of value found upon the dead, wounded, and prisoners must, according to article 14 of the Hague Regulations, be handed over to the Bureau of Information regarding prisoners of war, which must transmit

[1] See above, § 133, note.
[2] See below, § 147.
[3] The Hague Regulations do not mention this case.
[4] See below, § 147.
[5] See above, § 139.
[6] See article 4 of the Hague Regulations, and above, § 139.

them to those interested. Through this article 14 it becomes apparent that nowadays private enemy property, except arms and the like, is no longer booty, although individual soldiers often take as much spoil as they can get. It is impossible for the commanders to bring the offender to justice in every case.[1]

Private Enemy Property brought into a Belligerent's Territory.

§ 145. Different from the case of private property found by a belligerent on enemy territory is the case of such property brought during time of war into the territory of a belligerent. That private enemy property on a belligerent's territory at the time of outbreak of war cannot be confiscated has already been stated above in § 102. Taking this fact into consideration, as well as the other fact that private property found on enemy territory is nowadays likewise as a rule exempt from confiscation, there can be no doubt that private enemy property brought into a belligerent's territory during time of war can regularly not be confiscated.[2] On the other hand, a belligerent can prohibit the withdrawal of those articles of property which may be made use of by the enemy for military purposes, such as arms, ammunition, provisions, and the like. And in analogy with article 53 of the Hague Regulations there can be no doubt that a belligerent can seize such articles and make use of them for military purposes, provided that he restores them at the conclusion of peace and pays indemnities for them.

[1] It is of interest to state the fact that, during the Russo-Japanese War, Japan carried out to the letter the stipulation of article 14 of the Hague Regulations. Through the intermediary of the French Embassies in Tokio and St. Petersburg, all valuables found on the Russian dead and seized by the Japanese were handed over to the Russian Government.

[2] The case of enemy merchantmen seized in a belligerent's territorial waters is, of course, an exception.

VII

Requisitions and Contributions

Vattel, III. § 165—Hall, § 140–140*—Lawrence, § 204—Maine, p. 200—Twiss, II. § 64—Halleck, II. pp. 68–69—Taylor, §§ 538–539—Bluntschli, §§ 653–655—Heffter, § 131—Lueder in Holtzendorff, IV. pp. 500–510—Ullmann, § 155—Bonfils, Nos. 1207–1226—Pradier-Fodéré, VII. Nos. 3048–3064—Rivier, II. pp. 323–327—Calvo, IV. §§ 2231–2284—Fiore, III. Nos. 1394, 1473–1476—Martens, II. § 120—Longuet, §§ 110–114—Mérignhac, pp. 272–298—Pillet, pp. 215–235—Kriegsgebrauch, pp. 61–63—Holland, War, Nos. 75–77—Thomas, "Des réquisitions militaires" (1884)—Keller, "Requisition und Kontribution" (1898)—Pont, "Les réquisitions militaires du temps de guerre" (1905)—Risley in the "Journal of the Society of Comparative Legislation," new series, vol. II. (1900), pp. 214–223.

War must support War.

§ 146. Requisitions and contributions in war are the outcome of the eternal principle that war must support war. This principle means that every belligerent can make his enemy pay as far as possible for the continuation of the war. But this principle, though it is as old as war and will only die with war itself, has not the same effect in modern times on the actions of belligerents as it formerly had. For thousands of years belligerents used to appropriate all enemy private and public property they could get hold of, and, when the modern International Law grew up, this practice found legal sanction. But since the end of the seventeenth century this practice grew milder under the influence of the experience that the provisioning of armies in enemy territory became more or less impossible when the inhabitants were treated according to the old practice. Although belligerents retained in strict law the right to appropriate all private with all public property, it became usual to abstain from enforcing such right, and in lieu thereof to impose contributions of cash

and requisitions in kind upon the inhabitants of the invaded country.[1] And when this usage developed, no belligerent ever thought of paying in cash for requisitions, or giving a receipt for them. But in the nineteenth century another practice became usual. Commanders then often gave a receipt for contributions and requisitions, in order to avoid abuse and to prevent further demands by succeeding commanders for fresh contributions and requisitions without knowledge of the former impositions. And there are instances of the nineteenth century on record when belligerents paid actually in cash for all requisitions they made. The usual practice at the end of the nineteenth century was that commanders always gave a receipt for contributions, and that they either paid in cash for requisitions or acknowledged them by receipt, so that the respective inhabitants could be indemnified by their own Government after conclusion of peace. However, no restriction whatever was imposed upon commanders with regard to the amount of contributions and requisitions, and with regard to the proportion between the resources of a country and the burden imposed. The Hague Regulations have now settled the matter of contributions and requisitions in a progressive way by enacting rules which put the whole matter on a new basis. That war must support war remains a principle under these regulations also. But they are widely influenced by the demand that the enemy State as such, and not the private enemy individuals, should be made to support the war, and that only as far as the necessities of war demand it contributions and

[1] An excellent sketch of the historical development of the practice of requisitions and contributions is given by Keller, Requisition und Kontribution (1898) pp. 5–26.

requisitions should be imposed. Although certain public moveable property and the produce of public immoveables may be appropriated as heretofore, requisitions must be paid for in cash or, if this is impossible, acknowledged by receipt.

Requisitions in Kind and Quartering.

§ 147. Requisition is the name for the demand of the supply of all kinds of articles necessary for an army either as provisions for men and horses or as clothing or as means of transport. Requisition of certain services can also be made, but they will be treated below in § 170 together with occupation, requisitions in kind only being within the scope of this section. Now, what articles can be demanded by an army cannot once for all be laid down, as they depend upon the actual need of an army. According to article 52 of the Hague Regulations, requisitions can be made from municipalities as well as from inhabitants, but they may be made as far only as they are really necessary for the army. They cannot be made by individual soldiers or officers, but only by the commander in the locality. All requisitions must be paid for in cash, and if this is impossible, they must be acknowledged by receipt, so that the municipalities or inhabitants can be indemnified later on by their Government. Apart from others, it becomes by this rule of the Hague Regulations again apparent and beyond all doubt that henceforth private enemy property is as a rule exempt from appropriation by an invading army.

A special kind of requisition is the quartering[1] of soldiers in the houses of private inhabitants of enemy territory, by which each inhabitant is required to supply lodging and food for a certain number of soldiers, and sometimes also stabling and forage for horses.

[1] See above § 143.

Although the Hague Regulations do not specially mention quartering, article 52 is nevertheless to be applied to it, since quartering is nothing else than a special kind of requisition. If cash is not paid for quartering, every inhabitant concerned must get a receipt for it, stating the number of soldiers quartered and the number of days they were catered for. It must be specially observed that, according to article 5 of the Geneva Convention, such inhabitants as entertain wounded soldiers in their houses shall be exempted [1] from the quartering of troops.

Contributions.

§ 148. Contribution is a payment in ready money demanded either from municipalities or from inhabitants, whether enemy subjects or foreign residents. Whereas formerly no general rules concerning contributions existed, articles 49 and 51 of the Hague Regulations enact now that contributions cannot be demanded extortionately, but exclusively [2] for the needs of the army or for the administration of the locality in question. They can be imposed by a written order of a commander-in-chief only, in contradistinction to requisitions which can be imposed by a mere commander in a locality. They cannot be imposed indiscriminately on the inhabitants, but must as far as possible be assessed upon such inhabitants in compliance with the rules in force of the respective enemy Government regarding the assessment of taxes. And, finally, for every individual contribution a receipt must be given. It is apparent that these rules of the Hague Regulations try to exclude all arbitrariness and despotism on the part of an invading enemy with regard to con-

[1] See above, § 122.

[2] As regards contributions as a penalty, see article 50 of the Hague Regulations. See also Keller, l.c. pp. 60-62.

tributions, and that they try to secure to the individual contributors as well as to contributing municipalities the possibility of being indemnified afterwards by their own Government, thus shifting, as far as possible, the burden of supporting the war from private individuals and municipalities to the State proper.[1]

Here also, as in the case of requisitions, it must be specially observed that article 5 of the Geneva Convention enacts that inhabitants of the enemy territory who entertain wounded soldiers shall be exempted from a part of the contributions of war which may be imposed.

VIII

Destruction of Enemy Property

Grotius, III. c. 5, §§ 1–3; c. 12—Vattel, III. §§ 166–168—Hall, § 186—Lawrence, § 229—Manning, p. 186—Twiss, II. §§ 65–69—Halleck, II. pp. 63, 64, 71, 74—Taylor, §§ 481–482—Wharton, III. § 349—Wheaton, §§ 347–351—Bluntschli, §§ 649, 651, 662, 663—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 482–485—Klüber, § 262—G. F. Martens, II. § 280—Ullmann, § 149—Bonfils, No. 1078—Pradier-Fodéré, VI. Nos. 2770–2774—Rivier, II. pp. 265–268—Calvo, IV. §§ 2215–2222—Fiore, III. Nos. 1383–1388—Martens, II. § 110—Longuet, §§ 99, 100—Mérignhac, pp. 266–268—Kriegsgebrauch, pp. 52–56—Holland, War, Nos. 7 and 58 (*g*).

Wanton destruction prohibited.

§ 149. In former times invading armies frequently used to burn and fire all enemy property they could not make use of or carry away. Afterwards, when the practice of warfare grew milder, belligerents in strict law retained the right to destroy enemy pro-

[1] It is strange to observe that Kriegsgebrauch, pp. 61–63, does not mention the Hague Regulations at all.

perty according to discretion, although they did, as a rule, no longer make use of such right. Nowadays, however, this right is obsolete. For in the nineteenth century it became a generally and universally recognised rule of International Law that all useless and wanton destruction of enemy property, be it public or private, is absolutely prohibited. And this rule has now expressly been enacted by article 23 (letter *g*) of the Hague Regulations, where it is categorically enacted that it is prohibited "to destroy . . . . enemy's property, unless such destruction . . . . be imperatively demanded by the necessities of war."

Destruction for the purpose of Offence and Defence

§ 150. All destruction and damage of enemy property in the interest of offence and defence is *necessary* destruction and damaging, and therefore lawful. It is not only permissible to destroy and damage all kinds of enemy property on the battlefield during battle, but also in preparation of battle and of expected siege. To strengthen a defensive position a house may be destroyed or damaged. To cover the retreat of an army a village on the battlefield may be fired. The district around an enemy fortress held by a belligerent may be razed, and, therefore, all private and public buildings, all vegetation may be destroyed, and all bridges blown up within a certain area. If a farm, a village, or even a town is not to be abandoned but prepared for defence, it may be necessary to commit all sorts of destruction and damage of private and public property. Further, if and where a bombardment is lawful, all destruction of property involved in it becomes likewise lawful. When a belligerent force gets hold of an enemy factory for ammunition or provisions for the enemy troops, and if it is not

certain that they can hold it against an attack, they may at least destroy the plant, if not the buildings. Or if a force occupies an enemy fortress, they may raze the fortifications. Even a force intrenching themselves on a battlefield may be obliged to commit destruction of all sorts.

Destruction in marching, reconnoitring, and conducting Transport.

§ 151. Destruction of enemy property in marching troops, conducting military transport, and in reconnoitring, is likewise lawful if unavoidable. A reconnoitring party need not keep on the road if they can better serve their purpose by riding across the tilled fields. And troops may be marched and transport may be conducted over crops when necessary. A humane commander will not easily allow his troops and transport to march and ride over tilled fields and crops. But if the purpose of war necessitates it he is justified in doing so.

Destruction of Arms, Ammunition, and Provisions.

§ 152. Whatever enemy property a belligerent can appropriate he can likewise destroy. To prevent the enemy from making use of them a retreating force can destroy arms, ammunition, provisions, and the like, which they have taken from the enemy or requisitioned and cannot carry away. But it must be specially observed that they cannot destroy provisions in possession of private enemy inhabitants to prevent the enemy from making future use of them.

Destruction of Historical Monuments, Works of Art, and the like.

§ 153. All destruction of and damage to historical monuments, works of art and science, buildings for charitable, educational, and religious[1] purposes are specially prohibited by article 56 of the Hague

[1] It is of importance to state the fact, that according to Grotius (III. c. 5, §§ 2 and 3), destruction of graves, churches, arms, and the like is not prohibited by the Law of Nations, although he strongly (III. c. 12, §§ 5–7) advises to spare them unless their preservation is dangerous to the interests of the invader.

Regulations. But it must be emphasised that these objects enjoy this protection during military occupation only of enemy territory. Should a battle be waged around an historical monument in the open ground, should a church, a school or a museum be defended and attacked during military operations, these otherwise protected objects may be destroyed and damaged under the same conditions as other enemy property.

General Devastation.

§ 154. The question must, lastly, be taken into consideration whether and under what conditions general devastation of a locality, be it a town or a larger part of enemy territory, is permitted. There cannot be the slightest doubt that such devastation is as a rule absolutely prohibited and exceptionally only permitted when, to use the words of article 23 (*g*) of the Hague Regulations, it is "imperatively demanded by the necessities of war." It is, however, impossible to define once for all the circumstances which make a general devastation necessary, since everything depends upon the merits of the special case. But the fact that a general devastation can be lawful must be admitted. And it is, for instance, lawful in case of a levy *en masse* on already occupied territory, when self-preservation obliges a belligerent to take refuge in the most severe measures. It is, to give another example, further lawful when, after the defeat of his main forces and occupation of his territory, an enemy disperses his remaining forces into small bands which carry on guerilla tactics and receive food and information, so that there is no hope of ending the war except by a general devastation which cuts off supplies of every kind from the guerilla bands. But it must be emphasised that only imperative necessity and the fact

that there is no better and less severe way open to a belligerent justify general devastation.[1]

Be that as it may, whenever a belligerent resorts to general devastation he ought, if possible, to make some provision for the unfortunate peaceful part of the population of the devastated tract of territory. It would be more humane to take them away into captivity instead of letting them perish on the spot. The practice, resorted to during the South African war, to house the victims of devastation in concentration camps, must be approved. The purpose of war may even oblige a belligerent to confine a population forcibly[2] in concentration camps.

IX

Assault, Siege, and Bombardment

Vattel, III. §§ 168-170—Hall, § 186—Halleck, II. pp. 59, 67, 185—Taylor, §§ 483-485—Bluntschli, §§ 552-554B—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 448-457—G. F. Martens, II. § 286—Ullmann, § 153—Bonfils, Nos. 1079-1087—Despagnet, Nos. 531-537—Pradier-Fodéré, VI. Nos. 2779-2786—Rivier, II. pp. 284-288—Calvo, IV. §§ 2067-2095—Fiore, III. Nos. 1322-1330—Longuet, §§ 58-59—Mérignhac, pp. 171-182—Pillet, pp. 101-112—Kriegsgebrauch, pp. 18-22—Holland, War, Nos. 59-62—Rolin-Jaequemyns in R.I., II. (1870) pp. 659 and 674, III. (1871) pp. 297-307.

Assault, Siege, and Bombardment, when lawful.

§ 155. Assault is the rush of an armed force upon enemy forces in the battlefield, or upon intrenchments, fortifications, habitations, villages or towns, such rushing force committing every violence against opposing persons and destroying all impediments.

[1] See Hall, § 186, who gives *in nuce* a good survey of the doctrine and practice of general devastation from Grotius down to the beginning of the nineteenth century.

[2] See above, § 116.

Siege is called the surrounding and investing of an enemy locality by an armed force, cutting off those inside from all communication for the purpose of starving them into surrender or for the purpose of attacking the invested locality and taking it by assault. Bombardment is the throwing of shot and shell upon persons and things by artillery. Siege may be accompanied by bombardment and assault, but this is not necessary, since a siege may be carried out by mere investment and starvation caused thereby. Assault, siege, and bombardment are severally and jointly perfectly legitimate means of warfare.[1] Bombardment as well as assault, if taking place on the battlefield, need no special discussion, as they are allowed under the same circumstances and conditions as force in general is allowed. The question here is only under what circmstances assault and bombardment are allowed outside the battlefield. The answer is indirectly given by article 25 of the Hague Regulations, where it is categorically enacted that "the attack or bombardment of towns, villages, habitations, or buildings, which are not defended, is prohibited." Siege is not specially mentioned, because no belligerent would dream of besieging an undefended locality, and because siege of an undefended town would involve unjustifiable violence against enemy persons and, therefore, be unlawful. Be this as it may, the fact that now defended localities only may be bombarded, involves a decided advance on the former condition of International Law. For it was

[1] The assertion of some writers —see, for instance, Pillet, pp. 104–107, and Mérignhac, p. 173—that bombardment is lawful only after an unsuccessful attempt of the besiegers to starve the besieged into surrender is not based upon a recognised rule of the Law of Nations.

formerly asserted by many writers[1] and military experts that, for certain reasons and purposes, undefended localities could exceptionally be bombarded also. But it must be specially observed that it matters not whether the defended locality is fortified or not, since an unfortified place can likewise be defended.[2] And it must be mentioned that nothing prevents a belligerent who has taken possession of an undefended fortified place from destroying the fortifications by bombardment as well as by other means.

Assault, how carried out.

§ 156. No special rules of International Law exist with regard to the mode of carrying out an assault. Therefore, only the general rules respecting offence and defence find application. It is in especial not[3] necessary to notify an assault to the authorities of the respective locality, or to request them to surrender before making an assault. That an assault may or may not be accompanied or preceded by a bombardment, need hardly be mentioned, nor that by article 28 of the Hague Regulations pillage of towns taken by assault is now expressly prohibited.

Siege, how carried out.

§ 157. With regard to the mode of carrying out siege without bombardment no special rules of International Law exist, and here too only the general rules respecting offence and defence find application. Therefore, an armed force besieging a town can, for instance, cut off the river which supplies the drinking water to the besieged, but they are not allowed to poison[4] such river. And it must be specially observed that no rule of law exists which obliges a besieging force to allow all non-combatants, or only women, children, the aged, the sick and wounded,

[1] See, for instance, Lueder in Holtzendorff, IV. p. 451.

[2] See Holls, The Peace Conference at the Hague (1900), p. 152.

[3] This becomes indirectly apparent from article 26 of the Hague Regulations.

[4] See above, § 110.

or subjects of neutral Powers, to leave the besieged locality unmolested. Although such permission[1] is sometimes granted, it is in most cases refused, because the fact that non-combatants are besieged together with the combatants, and that they have to endure the same hardships, may, and very often does, exercise a pressure upon the authorities to surrender.

That diplomatic envoys of neutral Powers may not be prevented from leaving a besieged town is a consequence of their exterritoriality. However, if they voluntarily remain, can they claim an uncontrolled[2] communication with their home State by correspondence and couriers? When Mr. Washburne, the American diplomatic envoy at Paris during the siege of that city in 1870 by the Germans, claimed the right of sending a messenger with despatches to London in a sealed bag through the German lines, Count Bismarck declared that he was ready to allow foreign diplomatists in Paris to send a courier to their home States once a week, but only under the condition that their despatches were open and did not contain any remarks concerning the war. Although the United States and other Powers protested, Count Bismarck did not alter his decision. The whole question must be treated as open.[3]

Bombardment, how carried out.

§ 158. Regarding bombardment, article 26 of the Hague Regulations enacts that the commander of the attacking forces shall do all he can to notify his intention to resort to bombardment. But it must be emphasised that a strict duty of notification for all cases of bombardment is thereby not imposed, since

[1] Thus in 1870, during the Franco-German War, the German besiegers of Strassburg as well as of Belfort allowed the women, the children, and the sick to leave the besieged fortresses.

[2] The matter is discussed by Rolin-Jaequemyns in R.I., III. (1871), pp. 371–377.

[3] See above, vol. I. § 399, and Wharton, I. § 97.

it is only enacted that a commander *shall do all he can* to send notification. He cannot do it when the circumstances of the case prevent him, or when the necessities of war demand an immediate bombardment. Be that as it may, the purpose of notification is to enable private individuals inside the locality to be bombarded to seek shelter for their persons and for their valuable personal property.

Article 27 of the Hague Regulations enacts the hitherto customary rule that all necessary steps must be taken to spare as far as possible all buildings devoted to religion, art, science, and charity; further, hospitals and other places where the sick and wounded are collected, provided these buildings and places are not used at the same time for military purposes. To enable the attacking forces to spare these buildings and places, the latter must be indicated by some particular signs, which must be previously notified to the attacking forces and must be visible from the far distance from which the besieging artillery carries out the bombardment.[1]

It must be specially observed that no legal duty exists for the attacking forces to restrict bombardment to fortifications only. On the contrary, destruction of private and public buildings through bombardment has always been and is still considered lawful, as it is one of the means to impress upon the authorities the advisability of surrender. Some writers[2] assert

[1] No siege takes place without the besieged accusing the besiegers of neglecting the rule that buildings devoted to religion, art, charity, the tending of the sick, and the like, must be spared during bombardments. The fact is that in case of a bombardment the destruction of such buildings cannot always be avoided, although the artillery of the besiegers do not intentionally aim at them. That the forces of civilised States intentionally destroy such buildings, I cannot believe.

[2] See, for instance, Pillet, pp. 104-107; Bluntschli, § 554A; Mérignhac, p. 180. Vattel (III. § 169) does not deny the right to bombard the town, although he does not recommend it.

either that bombardment of the town, in contradistinction to the fortifications, is never lawful, or that it is only lawful when bombardment of the fortifications has not resulted in inducing surrender. But this opinion does not represent the actual practice of belligerents, and the Hague Regulations do not adopt it.

X

Espionage and Treason

Vattel, III. §§ 179-182—Hall, § 188—Lawrence, § 222—Phillimore, III. § 96—Halleck, I. pp. 571-575—Taylor, §§ 490 and 492—Wharton, III. § 347—Bluntschli, §§ 563-564, 628-640—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 461-467—Ullmann, § 149—Bonfils, Nos. 1100-1104—Despagnet, Nos. 539, 540, 542—Pradier-Fodéré, VI. Nos. 2762-2768—Rivier, II. pp. 282-284—Calvo, IV. §§ 2111-2122—Fiore, III. Nos. 1341, 1374-1376—Martens, II. § 116—Longuet, §§ 63-75—Mérignhac, pp. 183-209—Pillet, pp. 97-100—Kriegsgebrauch, pp. 30-31—Holland, War, Nos. 65-67—Friedemann, "Die Lage der Kriegskundschafter und Spione" (1892).

Twofold Character of Espionage and Treason.

§ 159. War cannot be waged without all kinds of information about the forces and the intentions of the enemy and about the character of the country within the zone of military operations. To obtain the necessary information, it has always been considered lawful on the one hand to employ spies, and, on the other, to make use of the treason of enemy soldiers or private enemy subjects, whether they were bribed [1] or offered the information voluntarily and gratuitously. Article 24 of the Hague Regulations enacts the old customary rule that the employment of methods necessary to obtain information about the

[1] Some writers maintain, however, that it is not lawful to bribe enemy soldiers into espionage; see below, § 162.

enemy and the country is considered allowable. However, the fact that these methods are lawful on the part of the belligerent who employs them does not prevent the punishment of such individuals as are engaged in procuring information. Although a belligerent acts lawfully in employing spies and traitors, the other belligerent, who punishes spies and traitors, acts likewise lawfully. Indeed, espionage and treason bear a twofold character. For persons committing acts of espionage or treason are—as will be shown below in § 255—considered war criminals and may be punished, but the employment of spies and traitors is considered lawful on the part of the belligerents.

Espionage in contradistinction to Scouting and Despatch-bearing.

§ 160. Espionage must not be confounded, first, with scouting, and, secondly, with despatch-bearing. According to article 29 of the Hague Regulations, espionage is the act of a soldier or another individual who clandestinely, or under false pretences, seeks to obtain information in the zone of belligerent operations with the intention of communicating it to the other party. Therefore, soldiers not in disguise, who penetrate into the zone of operations of the enemy, are not spies. They are scouts who enjoy all privileges of the members of armed forces, and they must, when captured, be treated as prisoners of war. Likewise, soldiers or civilians charged with the delivery of despatches for their own army or for that of the enemy and carrying out their mission openly are not spies. And it matters not whether despatch-bearers make use of balloons or of other means of communication. Thus, a soldier or civilian trying to carry despatches from a force besieged in a fortress to other forces of the same belligerent, whether making use of a balloon or riding or walking at night time, may

not be treated as a spy. On the other hand, spying may well be carried out by despatch-bearers or by persons in a balloon, whether they make use of the balloon of a despatch-bearer or rise specially in a balloon for the purpose of spying.[1] The mere fact that a balloon is visible does not exclude the treatment of such persons as spies, since spying may, quite as well as clandestinely, take place under false pretences. But special care must be taken to really prove the fact of espionage in such cases, for an individual carrying despatches is *prima facie* not a spy and must not be treated as a spy until proved to be such.

A remarkable case of alleged, but not real, espionage is that of Major André, which occurred in 1780 during the American War of Independence. The American General Arnold, who was commandant of West Point, on the North River, intended to desert the Americans and to join the British forces. He opened negotiations with Sir Henry Clinton for the purpose of surrendering West Point, and Major André was commissioned by Sir Henry Clinton to make the final arrangements with Arnold. One night, meeting Arnold outside both the American and British lines, André did not return the way he came, but, after having changed his uniform for plain clothes and been furnished with a passport under the name of John Anderson by Arnold, undertook to return through the American lines. He was caught, convicted as a spy, and hanged. As André actually was not a spy, his conviction for espionage was not justified, and if such a case occurred nowadays, article 29 of the Hague Regulations would certainly prevent a conviction for espionage. Be that as it

[1] See below, § 356 (4), concerning wireless telegraphy.

may, George III. considered André a martyr, and honoured his memory by granting a pension to his mother and a baronetcy to his brother.[1]

Punishment of Espionage.

§ 161. The usual punishment for spying is hanging or shooting, but less severe punishments are, of course, admissible and sometimes enforced. However this may be, according to article 30 of the Hague Regulations a spy cannot be punished without a trial before a court-martial. And according to article 31 of the Hague Regulations a spy who is not captured in the act but rejoins the army to which he belongs, and is subsequently captured by the enemy, cannot be punished for his previous espionage and must be treated as a prisoner of war. No regard, however, is paid to the status, rank, position, or the motive of a spy. He may be a soldier or a civilian, an officer or a private. He may be following instructions of superiors or acting on his own initiative from patriotic motives. A case of espionage, remarkable on account of the position of the spy, is that of the American Captain Nathan Hale, which occurred in 1776. After the American forces had withdrawn from Long Island, Captain Hale recrossed under disguise and obtained valuable information about the English forces that had occupied the island. But he was caught before he could rejoin his army, and he was executed as a spy.[2]

Treason.

§ 162. Treason may be committed by a soldier or an ordinary subject of a belligerent, but it may also be committed by an inhabitant of an occupied enemy territory or even by the subject of a neutral State transitorily staying there, and it can take place

[1] See Phillimore, III. § 106; Halleck, I. p. 575; Rivier, II. p. 284.

[2] The case of Major Jokok and Captain Jokki, which is reported as a case of espionage, but is really a case of treason, will be discussed below in § 255.

after an arrangement with the favoured belligerent or without such an arrangement. In any case a belligerent making use of treason acts lawfully, although the Hague Regulations do not mention the matter at all. But treason may be embodied in many acts of different sorts; the possible cases of treason and its punishment will be discussed below in § 255. However, although it is generally recognised that such belligerent acts lawfully as makes use of the offer of a traitor, the question is controverted[1] whether a belligerent acts lawfully who bribes a commander of an enemy fortress into surrender, incites enemy soldiers to desertion, bribes enemy officers for the purpose of getting important information, incites the enemy subjects to rise against the legitimate Government, and the like. If the rules of the Law of Nations are formulated, not from doctrines of book-writers, but from what is done by the belligerents in practice, it must be asserted that all such acts, ugly and immoral as they are, are not considered illegal according to the Law of Nations.

[1] See Vattel, III. § 180; Heffter, § 125; Taylor, § 490; Ullmann, § 149 (8); Martens, II. § 110 (8); Longuet, § 52; Mérignhac, p. 188, and others. See also below, § 164.

XI

Ruses

Grotius, III. c. 1, §§ 6-18—Bynkershoek, Quaest. jur. publ. I. c. 1—Vattel, III. §§ 177-178—Hall, § 187—Lawrence, § 230—Phillimore, III. § 94—Halleck, I. pp. 566-571—Taylor, § 488—Bluntschli, §§ 565-566—Heffter, § 125—Lueder in Holtzendorff, IV. pp. 457-461—Ullmann, § 149—Bonfils, Nos. 1073-1075—Despagnet, No. 530—Pradier-Fodéré, VI. Nos. 2759-2761—Rivier, II. p. 261—Calvo, IV. §§ 2106-2110—Fiore, III. Nos. 1334-1339—Longuet, §§ 53-56—Mérignhac, pp. 165-168—Pillet, pp. 93-97—Kriegsgebrauch, pp. 23-24—Holland, War, Nos. 63-64—Brocher in R.I., V. (1873) pp. 325-329.

Character of Ruses of War.

§ 163. Ruses of war or stratagems are deceit employed during military operations for the purpose of misleading the enemy. Such deceit is of great importance in war, and, just as belligerents are allowed to employ all methods of obtaining information, so they are, on the other hand, allowed, and article 24 of the Hague Regulations confirms this, to employ all sorts of ruses for the purpose of deceiving the enemy. Very important objects may be attained through ruses of war, as, for instance, the surrender of a force or of a fortress, the evacuation of territory held by the enemy, the withdrawal from a siege, the abandonment of an intended attack, and the like. But ruses of war are also employed, and are very often the decisive factor, during battles.

Different kinds of Stratagems.

§ 164. Of ruses there are so many kinds that it is impossible to enumerate and classify them. But to illustrate what acts are done under the cloak of ruse some instances may be given. Now, it is hardly necessary to mention the laying of ambushes and traps, the masking of military operations such as marches or the erection of batteries and the like,

the feigning of attacks or flights or withdrawals, the carrying out of a surprise, and other stratagems employed every day in war. But it is important to know that, when useful, feigned signals and bugle-calls may be ordered, the watchword of the enemy may be used, deceitful intelligence may be disseminated,[1] the signals and the bugle-calls of the enemy may be mimicked[2] to mislead his forces. And even such ugly acts[3] as bribery of enemy commanders and officials in high position and secret seduction of enemy soldiers to desertion and of enemy subjects to insurrection, are frequently committed, although many writers protest. As regards the use of the national flag, the military ensigns, and the uniforms of the enemy, theory and practice are unanimous in rejecting it during actual attack and defence, since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe. But many[4] publicists maintain that until the actual fighting begins belligerent forces may by way of stratagem make use of the national flag, military ensigns, and uniforms of the enemy. Article 23 (*f*) of the Hague Regulations does not prohibit any and every use of these symbols, but only their *improper* use, thus leaving the question open,[5] what use is a proper one and what not.

[1] See the examples quoted by Pradier-Fodéré, VI. No. 2761.

[2] See Pradier-Fodéré, VI. No. 2760.

[3] The point has been discussed above in § 162.

[4] See, for instance, Hall, § 187; Bluntschli, § 565; Taylor, § 488; Calvo, IV. No. 2106; Pillet, p. 95; Longuet, § 54. But, on the other hand, the number of publicists who consider it illegal to make use of the enemy flag, ensigns, and uniforms, even before an actual attack, is daily growing; see, for instance, Lueder in Holtzendorff, IV. p. 458; Mérignhac, p. 166; Pradier-Fodéré, VI. No. 2760; Bonfils, No. 1074; Kriegsgebrauch, p. 24. As regards the use of the enemy flag on the part of men-of-war, see below, in § 211.

[5] Some writers maintain that article 23 (*f*) of the Hague Regulations has settled the controversy, but they forget that this

Those who have hitherto taught the admissibility of the use of these symbols outside actual fighting can correctly maintain that the quoted article 23 (*f*) does not prohibit it.[1]

Stratagems in contradistinction to Perfidy.

§ 165. Stratagems must be carefully distinguished from perfidy, since the former are allowed, whereas the latter is prohibited. Halleck (I. p. 566) correctly formulates the distinction by laying down the principle that, whenever a belligerent has expressly or tacitly engaged and is therefore bound by a moral obligation to speak the truth to an enemy, it is perfidy to deceive the latter's confidence, because it contains a breach of good faith. Thus a flag of truce or the cross of the Geneva Convention must never be made use of for a stratagem, capitulations must be carried out to the letter, the feigning of surrender for the purpose of alluring the enemy into a trap is a treacherous act, as is the assassination of enemy commanders or soldiers or heads of States. On the other hand, stratagem may be met by stratagem, and a belligerent cannot complain of the enemy who has so deceived him. If, for instance, a spy of the

article speaks only of the *improper* use of the enemy ensigns and uniform.

[1] Different from the use of the enemy uniform for the purpose of deceit is the case when members of armed forces who are deficient in clothes wear the uniforms of prisoners or of the enemy dead. If this is done—and it always will be done if necessary—such distinct alterations in the uniform ought to be made as make it apparent to which side the soldiers concerned belong (see Holland, War, No. 64). Again different is the case where soldiers are through lack of clothing obliged to wear apparel of civilians, such as great-coats, hats, and the like. Care must be taken here that the soldiers concerned do nevertheless wear a fixed distinctive emblem which marks them as soldiers, since otherwise they lose the privileges of members of the armed forces of the belligerents (see article 1, No. 2, of the Hague Regulations). During the Russo-Japanese War both belligerents repeatedly accused each other of using Chinese clothing for members of their armed forces; the soldiers concerned apparently were obliged through lack of proper clothing temporarily to make use of Chinese garments.

enemy is bribed to give deceitful intelligence to his employer, or if an officer, who is approached by the enemy and offered a bribe, accepts it feignedly but deceives the briber and leads him to disaster, no perfidy is committed.

XII

Occupation of Enemy Territory

Grotius, III. c. 6, § 4—Vattel, III. §§ 197-200—Hall, §§ 153-161—Lawrence, § 200-201—Maine, pp. 176-183—Halleck, II. pp. 432-466—Taylor, §§ 568-579—Wharton, III. §§ 354-355—Bluntschli, §§ 539-551—Heffter, §§ 131-132—Lueder in Holtzendorff, IV. pp. 510-524—Klüber, §§ 255-256—G. F. Martens, II. § 280—Ullmann, §§ 155-156—Bonfils, Nos. 1156-1175—Despagnet, Nos. 566-577—Pradier-Fodéré, VII. Nos. 2939-2988, 3019-3028—Rivier, II. pp. 299-306—Calvo, IV. §§ 2166-2198—Fiore, III. Nos. 1454-1481—Martens, II. §§ 117-119—Longuet, §§ 115-133—Mérignhac, pp. 241-262—Pillet, pp. 237-259—Kriegsgebrauch, pp. 45-50—Holland, War, Nos. 68-74, 79-81—Waxel, "L'armée d'invasion et la population" (1874)—Litta, "L'occupazione militare" (1874)—Bernier, "De l'occupation militaire en temps de guerre" (1884)—Corsi, "L'occupazione militare in tempo di guerra e le relazione internazionale che ne derivano" (2nd edit. 1886)—Bray, "De l'occupation militaire en temps de guerre, &c." (1891)—Magoon, "Law of Civil Government under Military Occupation" (2nd edit. 1900)—Lorriot, "De la nature de l'occupation de guerre" (1903)—Rolin-Jaequemyns in R.I., II. (1870), p. 666, and III. 1871) p. 311—Löning in R.I., IV. (1872), p. 622, and V. (1873), p. 69.

Occupation as an Aim of Warfare

§ 166. If a belligerent succeeds in occupying a part or even the whole of the enemy territory, he has realised a very important aim of warfare. He can now not only make use of the resources of the enemy country for military purposes, but can also keep it for the time being as a pledge of his military success, and thereby impress upon the enemy the necessity of submitting to terms of peace. And in

regard to occupation, International Law respecting warfare has progressed more than in any other department. In former times enemy territory that was occupied by a belligerent was in every point considered his State property, with which and with the inhabitants therein he could do what he liked. He could devastate the country with fire and sword, appropriate all public and private property therein, kill the inhabitants, or take them away into captivity, or make them take an oath of allegiance. He could, even before the war was decided and his occupation was definitive, dispose of the territory by ceding it to a third State, as, for instance, happened during the Northern War (1700–1718), when in 1715 Denmark sold the occupied Swedish territories of Bremen and Verden to Hanover. That an occupant could force the inhabitants of the occupied territory to serve in his own army and to fight against their legitimate sovereign, was indubitable. Thus, during the Seven Years' War, Frederick II of Prussia repeatedly made forcible levies of thousands of recruits in Saxony, which he had occupied. But during the second half of the eighteenth century things gradually began to undergo a change. The distinction between mere temporary military occupation of territory, on the one hand, and, on the other, real acquisition of territory through conquest and subjugation, became more and more apparent, since Vattel (III. § 197) had drawn attention to it. However, it was not till long after the Napoleonic wars in the nineteenth century that the consequences of this distinction were carried to their full extent by the theory and practice of International Law. The first to do this was Heffter (§ 131), whose treatise made its appearance in 1844. And it is certain that it took the

whole of the nineteenth century to develop such rules regarding occupation as are now universally recognised and in many respects enacted by articles 42–56 of the Hague Regulations.

In so far as these rules touch upon the special treatment of persons and property of the inhabitants of and public property situated within occupied territory, they have already been taken into consideration above in §§ 107–154. What concerns us here are the rights and duties of the occupying belligerent in relation to his political administration of the territory and to his political authority over its inhabitants.[1] The principle underlying these modern rules is that, although the occupant does in no wise acquire sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being a military authority over it. As he prevents thereby the legitimate Sovereign from exercising his authority and claims obedience for himself from the inhabitants, he has to administrate the country not only in the interest of his own military advantage, but also, as far as possible at least, for the public benefit of the inhabitants. Thus the present International Law not only gives certain rights to an occupant, but also imposes certain duties upon him.

Occupation when effected.

§ 167. Since an occupant, although his power is merely military, has certain rights and duties, the

[1] Most treatises, especially all the French, treat under the heading "occupation" not only of the rights and duties of an occupant concerning the political administration of the country and the political authority over the inhabitants, but also of other matters, such as appropriation of public and private property, requisitions and contributions, destruction of public and private property, violence against private enemy subjects and enemy officials. These matters have, however, nothing to do with occupation, but are better discussed in connexion with the means of land warfare; see above, §§ 107–154.

first question to deal with is, when and under what circumstances a territory must be considered occupied. Now it is certain that mere invasion is not yet occupation. A small belligerent force may raid an enemy territory without establishing any administration, but quickly rush on to some place in the interior for the purpose of reconnoitring, of destroying a bridge or depôt of munitions and provisions, and the like, and quickly withdraw after having realised its purpose. Although it may correctly be asserted that, as long and in so far as such raiding force is in possession of a locality and sets up a temporary administration therein, it occupies this locality, yet it certainly does not occupy the whole territory, and even the occupation of such locality ceases the moment the force leaves it behind. Article 42 of the Hague Regulations enacts now that territory is considered occupied when it is actually placed under the authority of the hostile army, and that such occupation applies only to the territory where such authority is established and in a position to assert itself. This definition of occupation is not at all precise, but it is as precise as a legal definition of such kind of fact as occupation can be. If, as some publicists [1] maintain, only such territory were actually occupied, in which every part is held by a sufficient number of soldiers to enforce immediately and on the very spot the authority of an occupant, an effective occupation of a large territory would simply be impossible, since then not only in every town, village, and railway station, but also in every isolated habitation and hut the presence of a sufficient number of

[1] See, for instance, Hall, § 161. This was also the standpoint of the delegates of the smaller States at the Brussels Conference of 1874 when the Declaration of Brussels was drafted.

soldiers would be necessary. Reasonably no other conditions ought to be laid down as regards effective occupation in war than those under which in time of peace a Sovereign is able to assert his authority over a territory. What these conditions are is a question of fact which is to be answered according to the merits of the single case. If, when the legitimate Sovereign is prevented from exercising his powers, the occupant is in the position to assert his authority and actually establishes an administration over a territory, it matters not with what means and in what ways his authority is exercised. For instance, when in the centre of a territory a larger force is established from which constantly flying columns are sent round the territory, such territory is indeed effectively occupied, provided there are no enemy forces present, and, further, provided these columns can really keep the territory concerned under control.[1] Again, when an army is marching on through enemy territory, taking possession of the lines of communication and the open towns, surrounding the fortresses with a besieging force, and disarming the inhabitants in open places of habitation, the whole territory left behind the army is effectively occupied, provided some kind of administration is established, and further provided that, as soon as it becomes necessary to assert the authority of the occupant, a sufficient force can within reasonable time be sent to the locality affected. The conditions vary with those of the country concerned.

[1] This is not identical with so-called *constructive* occupation, but is really *effective* occupation. An occupation is constructive only if an invader declares districts as occupied over which he actually does not exercise control—for instance, when he actually occupies only the capital of a large province, and proclaims to have thereby occupied the whole of the province, although he does not take any steps to exercise control over it.

When a vast country is thinly populated, a smaller force is necessary to occupy it, and a smaller number of centres need be garrisoned than in the case of a thickly populated country. Thus, the occupation of the former Orange Free State and the former South African Republic became effective in 1901 some time after their annexation by Great Britain and the degeneration of ordinary war into guerilla war, although only about 250,000 British soldiers had to keep up the occupation of a territory of about 500,000 square miles. The fact that all the towns and all the lines of communication were in the hands and under the administration of the British army, that the inhabitants of smaller places were taken away into concentration camps, that the enemy forces were either in captivity or routed into comparatively small guerilla bands, and finally, that wherever such bands tried to make an attack, a sufficient British force could within reasonable time make its appearance, was quite sufficient to assert British authority[1] over that vast territory, although it took more than a year before peace was finally established.

It must be emphasised that the rules regarding effective occupation must be formulated from the basis of actual practice quite as much as rules regarding other matters of International Law. Those rules are not authoritative which theorists lay down,

[1] The annexation of the Orange Free State dates from May 24, 1900, and that of the South African Republic from September 1, 1900. It may well be doubted whether at these dates the occupation of the territories concerned was already so complete as to be called effective; and the British Government ought not to have proclaimed the annexation at such early dates. But there ought to be no doubt that the occupation became effective some time afterwards, in 1901. See, however, Sir Thomas Barclay in the Law Quarterly Review, XXI. (1905), p. 307, who asserts the contrary; see also, below, p. 278, note 3, and p. 279, note 1.

but those which are abstracted from actual practice of warfare unopposed by the Powers.[1]

Occupation when ended.

§ 168. Occupation comes to an end when an occupant withdraws from a territory or is driven out of it. Thus, occupation of a territory ceases and remains only over a limited area if the forces occupying a territory are drawn into a fortress on that territory and are there besieged by the re-advancing enemy, or if the occupant concentrates his forces in a certain place of the territory, withdrawing before the re-advancing enemy. But occupation does not cease because the occupant, after having disarmed the inhabitants and having made arrangements for the administration of the country, is marching on to meet the retreating enemy, leaving only comparatively few soldiers behind.

Rights and Duties in General of the Occupant.

§ 169. As the occupant actually exercises authority, and as the legitimate Government is prevented from exercising its authority, the occupant acquires a temporary right of administration over the respective territory and its inhabitants. And all steps he takes in the exercise of this right must be recognised by the legitimate Government after occupation has ceased. This administration is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration. In carrying it out the occupant is, on the one hand, totally independent of the Constitution and the laws of the respective territory, since occupation is an aim of warfare, and since the maintenance and safety of his forces and the purpose of war stand in the foreground of his interest and must be promoted under

[1] The question is so much controverted that it is impossible to enumerate the different opinions. Readers who want to study the question must be referred to the literature quoted above at the commencement of § 166.

all circumstances and conditions. But, although regarding the safety of his army and the purpose of war the occupant is vested with an almost absolute power, he is, on the other hand, not the Sovereign of the territory, and he, therefore, has no right to make such changes of the laws and of the administration as are not temporarily necessitated by his interest in the maintenance and safety of his army and in the realisation of the purpose of war. On the contrary, he has the duty of administrating the country according to the existing laws and the existing rules of administration; he must insure public order and safety, must respect family honour and rights, individual lives, private property, religious convictions and liberty. Article 43 of the Hague Regulations enacts the following rule of fundamental importance: "The authority of the legitimate Power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Rights of the Occupant regarding the Inhabitants.

§ 170. An occupant having authority over the territory, the inhabitants, whether subjects of the enemy or of neutral States, are under his sway and have to render obedience to his commands. However, the power of the occupant over the inhabitants is not unrestricted, since he is, according to articles 44 and 45 of the Hague Regulations, prohibited from compelling them to take the oath of allegiance and to take part in military operations against their legitimate Government. On the other hand, he can compel them to take an oath of neutrality,[1] and can

[1] This means, of course, nothing else than an oath to abstain from hostilities during the time of the occupation.

punish them severely for breaking it. He can impose requisitions and contributions[1] upon them, can compel them to render services as guides,[2] drivers, farriers, and the like. He can compel them to render services for the repair or the erection of such roads, buildings, or other works as are necessary for military operations.[3] He can also collect the ordinary taxes, dues, and tolls imposed for the benefit of the State by the legitimate Government. But in such case he is, according to article 48 of the Hague Regulations, obliged to make the collection, as far as possible, in accordance with the rules in existence and the assessment in force, and he is, on the other hand, bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

Whoever does not comply with his commands, or commits a prohibited act, can be punished by him; but article 50 of the Hague Regulations expressly enacts the rule that *no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.* It must, however, in face of this rule, be specially observed that it does not at all prevent[4] reprisals on the part of belligerents occupying enemy territory. In case acts of illegitimate warfare are committed by enemy individuals not belonging to the armed forces, reprisals may be resorted to, although practically innocent individuals are thereby punished for illegal acts for which they are neither legally nor morally responsible—for instance, when a village is burned by way of reprisals

[1] See above, §§ 147 and 148.

[2] This is generally recognised by theory and practice; see Holland, War, No. 70.

[3] See article 52 of the Hague Regulations.

[4] See Holland, War, No. 75 *bis*.

for a treacherous attack on enemy soldiers committed there by some unknown individuals.[1] Nor does this new rule prevent an occupant from taking hostages[2] in the interest of the safety of the line of communication threatened by guerillas not belonging to the armed forces, or for other purposes,[3] although the hostage must suffer for acts or omissions of others for which he is neither legally nor morally responsible.

Position of Government Officials and Municipal Functionaries during Occupation.

§ 171. Since through occupation the authority over the territory actually passes into the hands of the occupant, he can for the time of his occupation depose all Government officials and municipal functionaries that have not withdrawn together with the retreating enemy. On the other hand, he cannot oblige them by force to administer their functions during occupation, if they refuse to do so, except where a military necessity for the administration of a certain function arises. If they are willing to serve under him, he can make them take an oath of obedience, but not of allegiance, and he cannot oblige them to administer their functions in his name, but he can prevent them from doing so in the name of the legitimate Government.[4] Since, according to article 43 of the Hague Regulations

[1] See below, § 248.

[2] But this is a moot point; see below, § 259.

[3] Belligerents sometimes take hostages for the purpose of securing compliance with contributions, requisitions, and the like. As long as such hostages obtain the same treatment as prisoners of war, the practice seems not to be illegal, although the Hague Regulations do not mention and many publicists condemn it; see above, p. 122, note 1, and below, p. 273, note 2.

[4] Many publicists assert that in case an occupant leaves officials of the legitimate Government in office, he "must" pay them their ordinary salaries. But I cannot see that there is a customary or conventional rule in existence concerning this point. But it is in an occupant's own interest to pay such salaries, and he will as a rule do this. Only in the case of article 48 of the Hague Regulations is he obliged to do it.

he has to secure public order and safety, he must appoint temporarily other functionaries in case those of the legitimate Government refuse to serve under him, or in case he deposes them for the time of the occupation.

Position of Courts of Justice during Occupation.

§ 172. The particular position Courts of Justice have nowadays in civilised countries makes it necessary to discuss their position during occupation.[1] There is no doubt that an occupant can suspend the judges as well as other officials. However, if he does suspend them, he must appoint temporarily others in their place. If they are willing to serve under him, he must respect their independence according to the laws of the country. Where it is necessary, he can set up military Courts instead of the ordinary Courts. In case and in so far as he admits the administration of justice by the ordinary Courts, he can nevertheless, as far as it is necessary for military purposes or for the maintenance of public order and safety, temporarily alter the laws, especially the Criminal Law, on the basis of which justice is administered, as well as the laws regarding procedure. He has, however, no right to constrain the Courts to pronounce their verdicts in his name, although he need not allow them to pronounce verdicts in the name of the legitimate Government. As an illustration of this may serve a case that happened during the Franco-German War in September 1870 after the fall of the Emperor Napoleon and the proclamation of the French Republic, when the Court of Appeal at Nancy pronounced its verdicts under the formula "In the name of the French People and Government." Since Germany had not yet recognised the French Republic, the Germans ordered the Court

[1] See Petit, L'Administration de la justice en territoire occupé (1900).

to use the formula "In the name of the High German Powers occupying Alsace and Lorraine," but gave the Court to understand that, if the Court objected to this formula, they were disposed to admit another, and were even ready to admit the formula "In the name of the Emperor of the French," as the Emperor had not abdicated. The Court, however, refused to pronounce its verdict otherwise than "In the name of the French Government and People," and, consequently, suspended its sittings. There can be no doubt that the Germans had no right to order the formula to be used, "In the name of the High German Powers &c.," but they were certainly not obliged to admit the formula preferred by the Court; and the fact that they were disposed to admit another formula than that at first ordered ought to have made the Court accept a compromise. Bluntschli (§ 547) correctly maintains that the most natural solution of the difficulty would have been to use the neutral formula "In the name of the Law."

CHAPTER IV

WARFARE ON SEA

I

On Sea Warfare in General

Hall, § 147—Lawrence, §§ 216–217—Maine, pp. 117–122—Manning, pp. 183–184—Phillimore, III. § 347—Twiss, II. § 73—Halleck, II. pp. 80–82—Taylor, § 547—Wharton, III. §§ 342–345—Wheaton, § 355—Bluntschli, §§ 665–667—Heffter, § 139—Geffcken in Holtzendorff, IV. pp. 547–548, 571–581—Ullmann, §§ 159–160—Bonfils, Nos. 1268, 1294–1338—Despagnet, Nos. 638–645—Rivier, II. pp. 329–335—Calvo, IV. §§ 2123, 2379–2410—Fiore, III. Nos. 1399–1413—Pillet, pp. 118–120—Perels, § 36—Testa, pp. 147–157—Boeck, Nos. 3–153—Lawrence, Essays, pp. 278–306—Westlake, Chapters, pp. 245–253—Ortolan, I. pp. 35–50—Hautefeuille, I. pp. 161–167—Gessner, Westlake, Lorimer, Rolin-Jaequemyns, Laveleye, Albéric Rolin, and Pierantoni in R.I., VII. (1875), pp. 256–272 and 558–656—Twiss, in R.I., XVI. (1884), pp. 113–137.—See also the authors quoted below, p. 186, note 2.

Aims and Means of Sea Warfare

§ 173. The purpose of war is the same in warfare both on land and on sea—namely, the overpowering of the enemy. But sea warfare serves this purpose by attempting the accomplishment of aims which are different from those of land warfare. Whereas the aims of land warfare are defeat of the enemy army and occupation of the enemy territory, the aims[1] of sea warfare are: defeat of the enemy navy; annihilation of the enemy merchant fleet; destruction of enemy coast fortifications, and of maritime as well as

[1] Aims of sea warfare must not be confounded with ends of war; see above, § 66.

military establishments on the enemy coast; cutting off intercourse with the enemy coast; prevention of carriage of contraband and analogous of contraband to the enemy; all kinds of support to military operations on land, such as protection of a landing of troops on the enemy coast; and, lastly, defence of the home coast and protection to the home merchant fleet.[1] The means through which belligerents in sea warfare endeavour to realise these aims are: attack on and seizure of enemy vessels, violence against enemy individuals, appropriation and destruction of enemy vessels and their goods, requisitions and contributions, bombardment of the enemy coast, cutting of submarine cables, blockade, espionage, treason, ruses, capture of neutral vessels carrying contraband and analogous of contraband.

Lawful and Unlawful Practices of Sea Warfare.

§ 174. As regards means of sea warfare, just as regards means of land warfare, it must be emphasised that not every practice capable of injuring the enemy in offence and defence is lawful. Although no regulations regarding the laws of war on sea have as yet been enacted by a general law-making treaty as a pendant to the Hague Regulations, there are customary rules of International Law in existence that regulate this matter.[2] These rules are in many points identical with, but in many respects differ from, the rules in force regarding warfare on land. Accordingly, the means of sea warfare must be discussed singly in the following

[1] Article 1 of the U.S. Naval War Code enumerates the following as aims of sea warfare:— The capture or destruction of the military and naval forces of the enemy, of his fortifications, arsenals, dry docks, and dockyards, of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land; to protect and defend the national territory, property, and sea-borne commerce.

[2] A point not regulated is the use of floating mines; see below, § 182.

sections. But blockade and capture of vessels carrying contraband and analogous of contraband, although they are means of warfare against an enemy, are of such importance as regards neutral trade that they will be discussed below in Part III. §§ 368–413.

Objects of the Means of Sea Warfare.

§ 175. Whereas the objects against which means of land warfare may be directed are innumerable, the circle of the objects against which means of sea warfare are directed is very narrow, comprising six objects only. The chief object is enemy vessels, whether public or private. The next is enemy individuals, with distinction between those taking part in fighting and others. The third is enemy goods on enemy vessels. The fourth is the enemy coast. The fifth and sixth are neutral vessels attempting to break blockade and carrying contraband and analogous of contraband.

Development of International Law regarding Private Property on Sea.

§ 176. It is evident that in those times when a belligerent could destroy all public and private enemy property he could get hold of, no special rule existed regarding private enemy ships and private enemy property carried by them on the sea. But the practice of sea warfare went frequently beyond the limits of even so wide a right, treating neutral goods on enemy ships like enemy goods and treating neutral ships carrying enemy goods like enemy ships. It was not before the time of the *Consolato del Mare* in the fourteenth century that a set of clear and definite rules with regard to enemy private vessels and enemy private property on sea in contradistinction to neutral ships and neutral goods was adopted. According to this famous collection of maritime usages observed by the communities of the Mediterranean, there is no doubt that a belligerent can seize and appropriate all enemy private ships and goods. But a distinction

is made in case of either ship or goods being neutral. Although an enemy ship can always be appropriated, neutral goods thereon have to be restored to the neutral owners. On the other hand, enemy goods on neutral ships may be appropriated, but such neutral ships must be restored to their owners. However, these rules of the *Consolato del Mare* were not at all generally recognised, although they were adopted by several treaties between single States during the fourteenth and fifteenth centuries. Neither the communities belonging to the Hanseatic League, nor the Netherlands and Spain during the War of Independence, nor England and Spain during their wars in the sixteenth century, adopted these rules. And France expressly enacted by Ordinances of 1543 (article 42) and 1583 (article 69) that neutral goods on enemy ships as well as neutral ships carrying enemy goods should be appropriated.[1] Although France adopted in 1650 the rules of the *Consolato del Mare*, Louis XIV. dropped them again by the Ordinance of 1681 and re-enacted that neutral goods on enemy ships and neutral ships carrying enemy goods should be appropriated. Spain enacted the same rules in 1718. The Netherlands, in contradistinction to the *Consolato del Mare*, endeavoured by a number of treaties to foster the principle that the flag covers the goods, so that enemy goods on neutral vessels were exempt from, whereas neutral goods on enemy vessels were submitted to, appropriation. On the other hand, throughout the eighteenth and during the nineteenth century down to the beginning of the Crimean War in 1854, England adhered to the rules of the *Consolato del Mare*. Thus, no general rules of International

[1] *Robe d'ennemy confisque celle d'amy. Confiscantur ex navibus res, ex rebus naves.*

Law regarding private property on sea were in existence.[1] Matters were made worse by privateering, which was generally recognised as lawful, and by the fact that belligerents frequently declared a coast blockaded without having a sufficient number of men-of-war on the spot to make the blockade effective. It was not before the Declaration of Paris in 1856 that general rules of International Law regarding private property on sea came into existence.

Declaration of Paris.

§ 177. Things began to undergo a change with the outbreak of the Crimean War in 1854, when all the belligerents proclaimed that they would not issue Letters of Marque, and when, further, Great Britain declared that she would not seize enemy goods on neutral vessels, and when, thirdly, France declared that she would not appropriate neutral goods on enemy vessels. Although this alteration of attitude on the part of the belligerents was originally intended for the Crimean War only and exceptionally, it led after the conclusion of peace in 1856 to the famous and epoch-making Declaration of Paris,[2] which enacted the four rules—(1) that privateering is abolished, (2) that the neutral flag covers enemy's goods with the exception of contraband of war, (3) that neutral goods, contraband of war excepted, are not liable to capture under enemy's flag, (4) that blockades, in order to be binding, must be effective, which means maintained by a force sufficient really to prevent access to the coast of the enemy. Since, with the exception of a few States such as Spain, the United States of America, Mexico, Venezuela, Bolivia, and Uruguay, all members of the Family of Nations are now parties to

[1] Boeck, Nos. 3–103, and Geffcken in Holtzendorff, IV. pp. 572–578, give excellent summaries of the facts.

[2] See Martens, N.R.G., XV. p. 767, and above, vol. I. § 559. See also Gibson Bowles, The Declaration of Paris of 1856 (1900).

the Declaration of Paris, it may well be maintained that the quoted rules are general International Law, the more so as the non-signatory Powers have hitherto in practice always acted in accordance with those rules.[1]

The Principle of Appropriation of Private Enemy Vessels and Enemy Goods thereon.

§ 178. But the Declaration of Paris has not touched upon the old rule that private enemy vessels and private enemy goods thereon may be seized and appropriated, and this rule is, therefore, as valid as ever heretofore. On the other hand, there is a daily increasing agitation for the abrogation of this rule. Already in 1785 Prussia and the United States of America stipulated by article 23 of their Treaty of Friendship[2] that in case of war between the parties each other's merchantmen shall not be seized and appropriated. Again, in 1871 the United States and Italy, by article 12 of their Treaty of Commerce,[3] stipulated that in case of war between the parties each other's merchantmen, with the exception of those carrying contraband of war or attempting to break a blockade, shall not be seized and appropriated. Already in 1823 the United States made the proposal to Great Britain, France, and Russia[4] for a treaty abrogating the rule that enemy merchantmen and enemy goods thereon can be appropriated; but Russia alone accepted the proposal under the condition that all other naval Powers should consent. Again, in 1856,[5] on the occasion of the Declaration of Paris, the

[1] That there is an agitation for the abolition of the Declaration of Paris has been mentioned above on p. 93, note 2.

[2] Martens, R., IV. p. 37. Perels (p. 198) maintains that this article has not been adopted by the Treaty of Commerce between Prussia and the United States of May 1, 1828; but this statement is incorrect, for article 12 of this treaty—see Martens, N.R., VII. p. 615—adopts it expressly.

[3] See Martens, N.R.G., 2nd ser. I. p. 57.

[4] See Wharton, III. § 342, pp. 260–261.

[5] See Wharton, III. § 342, pp 270–287.

United States endeavoured to obtain the victory of the principle that enemy merchantmen shall not be appropriated, making it a condition of their accession to the Declaration of Paris that this principle should be recognised. But again the attempt failed owing to the opposition of Great Britain.

At the outbreak of war in 1866, Prussia and Austria expressly declared that they would not seize and appropriate each other's merchantmen. At the outbreak of the Franco-German War in 1870, Germany declared French merchantmen exempt from capture, but she changed her attitude when France did not act upon the same lines. It should also be mentioned that already in 1865 Italy, by article 211 of her Marine Code, enacted that, in case of war with any other State, enemy merchantmen not carrying contraband of war or breaking a blockade shall not be seized and appropriated, provided reciprocity is granted. And it should further be mentioned that the United States of America made a last attempt [1] to secure immunity from capture to enemy merchantmen and goods on sea at the Hague Peace Conference.

It cannot be denied that, as the matter stands, it was the opposition of Great Britain which has prevented the abolition of the rule that private enemy vessels and goods may be captured. Public opinion in this country is not prepared to consent to the abolition of this rule. And there is no doubt that the abolition of the rule would involve a certain amount of danger to a country like Great Britain, whose position and power depend chiefly upon the navy. The possibility of annihilating an enemy's commerce by annihilating his merchant fleet is a powerful weapon in the hands of a great naval Power.

[1] See Holls, The Peace Conference at the Hague, pp. 306-321.

Moreover, if enemy merchantmen are not captured, they may be fitted out as cruisers, or at least be made use of for the purpose of transport of troops, munitions, and provisions. Have not several maritime States made arrangements with their steamship companies which secure the building of their Transatlantic liners on the basis of plans which make these merchantmen easily alterable into men-of-war?[1] And cannot sailors of merchantmen be enrolled in the navy? The argument that it is unjust that private enemy citizens should suffer through having their property seized has no weight in face of the probability that fear of the annihilation of its merchant fleet in case of war may well deter a State intending to go to war from doing so. It is a matter for politicians, not for jurists, to decide the question whether Great Britain must in the interest of self-preservation oppose the abolition of the rule that sea-borne private enemy property can be confiscated. But it is beyond all doubt that the abolition of this rule cannot be forced upon Great Britain. And many signs portend a gradual change in the opinion of the Continental writers on International Law. Whereas formerly Continental opinion was nearly unanimous in postulating the abolition of the rule, the number of those is increasing who defend its preservation.[2]

[1] See above, § 84.

[2] See, for instance, Perels, § 36, pp. 195-198; Röpcke, Das Seebeuterecht (1904), pp. 36-47; Dupuis, Nos. 29-31. On the other hand, the Institute of International Law has several times voted in favour of the abolition of the rule; see Tableau Général de l'Institut de droit International (1893), pp. 190-193. The literature concerning the question of confiscation of private enemy property on sea is abundant. The following authors, besides those already quoted above at the commencement of § 173, may be mentioned:— Upton, The Law of Nations affecting Commerce during War (1863); Cauchy, Du respect de la propriété privée dans la guerre maritime (1866); Vidari, Del rispetto della proprietà privata fra gli stati in guerra (1867);

§ 179. Be that as it may, the time is not very far distant when the Powers will perforce come to an agreement on this as on other points of sea warfare in a code of regulations regarding sea warfare as a pendant to the Hague Regulations regarding warfare on land. An initiative step has already been taken by the United States of America through her Naval War Code[1] published in 1900, although she afterwards withdrew[2] it in 1904. Other States will no doubt follow her lead. It will then be comparatively easy for them to compromise upon a common code of regulations. The interests of neutrals in a maritime war make such a common code an urgent necessity.

Impending Codification of Law of Sea Warfare.

II

Attack and Seizure of Enemy Vessels

Hall, §§ 138 and 148—Lawrence, §§ 205-206—Phillimore, III. § 347—Twiss, II. § 73—Halleck, II. pp. 105-108—Taylor, §§ 545-546—Walker, § 50, p. 147—Wharton, III. § 345—Bluntschli, §§ 664-670—Heffter, §§ 137-139—Bonfils, Nos. 1269-1271, 1350-1354, 1398-1400—Despagnet, Nos. 650-656—Rivier, § 66—Calvo, IV. §§ 2368-2378—Fiore, III. Nos. 1414-1424—Pillet, pp. 120-128—Perels, § 35—Testa, pp. 155-157—Lawrence, War, pp. 48-55, 93-111—Ortolan, II. pp. 31-34—Boeck, Nos. 190-208—Dupuis, Nos. 150-158—U.S. Naval War Code, articles 13-16.

§ 180. Whereas in land warfare all sorts of violence against enemy individuals are the chief

Importance of Attack and

Gessner, Zur Reform des Kriegsseerechts (1875); Klobukowski, Die Seebeute oder das feindliche Privateigenthum zur See (1877); Bluntschli, Das Beuterecht im Kriege und das Seebeuterecht insbesondere (1878); Boeck, De la propriété privée ennemie sous pavillon ennemi (1882); Dupuis, La guerre maritime et les doctrines anglaises (1899); Leroy, La guerre maritime (1900); Röpcke, Das Seebeuterecht (1904). See also the literature quoted by Bonfils, No. 1281, and Boeck, Nos. 382-572, where the arguments of the authors against and in favour of the present practice are discussed.

[1] See above, vol. I. § 32.

[2] See above, p. 78, note 1.

Seizure of Enemy Vessels.

means, in sea warfare attack and seizure of enemy vessels are the most important means. For together with enemy vessels a belligerent gets hold of the enemy individuals and enemy goods thereon, so that he can appropriate vessels and goods as well as retain those enemy individuals who belong to the enemy armed forces as prisoners of war. For this reason violence against enemy persons and the other means of sea warfare play only a secondary part compared with attack and seizure of enemy vessels. On the other hand, such part is not at all unimportant. For a weak naval Power may even restrict the operations of her fleet to mere coast defence, and thus totally refrain from directly attacking and seizing enemy vessels.

Attack when legitimate.

§ 181. All enemy men-of-war and other public vessels, which are met by a belligerent's men-of-war on the High Seas and within the territorial waters of either belligerent, can at once be attacked, and the attacked vessel can, of course, defend herself by a counter-attack. Enemy merchantmen can be attacked only if they refuse to submit to visit after having been duly signalled to do so. And no duty exists for an enemy merchantman to submit to visit; on the contrary, she can refuse it, and defend herself against an attack. But only a man-of-war is competent to attack men-of-war as well as merchantmen, provided the war takes place between parties to the Declaration of Paris, so that privateering is prohibited. Any merchantman of a belligerent attacking an enemy merchantman would be considered and treated as a pirate. However, if once attacked by an enemy vessel, a merchantman is competent to deliver a counter-attack and need not discontinue her attack because the vessel that opened hostilities takes to flight, but can pursue and seize her. And it must be

specially observed that an attack upon enemy vessels on the sea can also be made from forces on the shore. This is, for instance, done when coast batteries fire upon an enemy man-of-war within reach of their guns.

Attack how effected.

§ 182. One mode of attack—namely, boarding and fighting the crew—which was in use at the time of sailing ships, and which may be described as a parallel to assault in land warfare, is now no longer made use of, although, if an instance occurred, it would be perfectly lawful. Attack is nowadays effected by cannonade, torpedoes, and, if opportunity arises, by ramming. Attack on merchantmen will, of course, regularly be made by cannonade only, as the attacking vessel aims at seizing her on account of her value. But, in case the attacked vessel not only takes to flight, but defends herself by a counter-attack, all modes of attack are lawful against her, just as she herself is justified in applying all modes of attack by way of defence.

A new mode of attack which requires special attention[1] is that through floating mechanical in contradistinction to so-called electro-contact mines. The latter need not specially be discussed, because they are connected with a battery on land, can naturally only be laid within territorial waters, and present no danger to neutral shipping except on the spot where they are laid. But floating mechanical mines can naturally be dropped as well in the Open Sea as in territorial waters; they can, moreover, drift away from the spot where they were dropped to any distance and thus become a great danger to navigation in general. Mechanical mines were first used by both parties in the Russo-Japanese War during the

[1] See Lawrence, War, pp. 93–111; Holland, Neutral Duties in a Maritime War (1905), pp. 7–8; Bonfils, No. 1273.

blockade of Port Arthur in 1904, and the question of their admissibility was at once raised in the press of all neutral countries. A mere literal application of the existing rules of International Law concerning the means of warfare would lead to the conviction that such floating mechanical mines can be made use of without restriction, for the Open Sea as well as the territorial waters of both belligerents belong to the region of war. But such a literal interpretation of the law would, I am convinced, meet with the opposition of the whole civilised world. It is true that neutral shipping near the theatre of war on the Open Sea as well as in the territorial waters of both belligerents is exposed to many risks and dangers indirectly resulting from the operations of warfare. But the dangers of ordinary operations in sea warfare are confined to the locality where these operations take place, whereas floating mines may drift hundreds of miles, and carry a great danger far away from the theatre of war. The matter ought to be regulated in the following way:—Every belligerent is allowed to drop floating mechanical mines inside his own or the territorial waters of the enemy, provided warning is given to neutrals to avoid the waters concerned. On the Open Sea no dropping of such mines is allowed except inside a line of blockade. In any case, all floating mines must be properly moored, so as to prevent, as far as possible, their drifting away. Under no circumstances and conditions is it allowed to set floating mines adrift.

Duty of giving Quarter.

§ 183. As soon as an attacked or counter-attacked vessel hauls down her flag and, therefore, signals that she is ready to surrender, she must be given quarter and seized without further firing. To continue an attack although she is ready to surrender and to

sink her and her crew would contain a violation of customary International Law, and would only exceptionally be admissible in case of imperative necessity or of reprisals.

Seizure.

§ 184. Seizure is effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board the captured vessel. But if this is for any reason impracticable, the captor orders the captured vessel to lower her flag and to steer according to his orders.

Effect of Seizure.

§ 185. The effect of seizure is different with regard to private enemy vessels, on the one hand, and, on the other, to public vessels. Seizure of *private* enemy vessels may be described as a parallel to occupation of enemy territory in land warfare. Since the vessel and the individuals and goods thereon are actually placed under the captor's authority, her officers and crew become prisoners of war, and any private individuals on board are for the time being submitted to the discipline of the captor, just as private individuals on occupied enemy territory are submitted to the authority of the occupant.[1] Seizure of private enemy vessels, although the capture is always made with the intention of appropriating the vessel and her enemy goods, does, however, not vest the property finally in the hands of the belligerent whose forces effected the capture. The prize has to be brought before a Prize Court, and it is the latter's confirmation of the capture through adjudication of the prize which makes the appropriation final for the capturing belligerent.[2]

On the other hand, the effect of seizure of *public* enemy vessels is their immediate and final appropriation. They may be either taken away into a port or

[1] See U.S. Naval War Code, article 11. [2] See below, § 192.

at once destroyed. All individuals on board become prisoners of war, although, if there should be perchance on board a mere private enemy individual of no importance, he would probably not be kept for long in captivity, but liberated in due time. As regards goods on captured public enemy vessels, there is no doubt that the effect of seizure is at once the final appropriation of such goods on the vessels concerned as are enemy property, and they may therefore at once be destroyed, if convenient. Should, however, neutral goods be on board a captured enemy public vessel, it is a moot point whether or not they share the fate of the captured ship. According to British practice they do, but according to American practice they do not.[1]

Immunity of Vessels of Discovery and Exploration.

§ 186. According to a general international usage enemy vessels engaged in scientific discovery and exploration are granted immunity from attack and seizure in so far and so long as they themselves abstain from hostilities. The usage grew up in the the eighteenth century. In 1766, the French explorer Bougainville, who started from St. Malo with the vessels "La Boudeuse" and "L'Etoile" on a voyage round the world, was furnished by the British Government with safe-conducts. In 1776, Captain Cook's vessels "Resolution" and "Discovery," sailing from Plymouth for the purpose of exploring the Pacific Ocean, were declared exempt from attack and seizure on the part of French cruisers by the French Government. Again, the French Count Lapérouse, who started on a voyage of exploration in 1785 with the vessels "Astrolabe" and "Boussole," was secured immunity from attack and seizure. During the nineteenth century this usage became quite

[1] See below, p. 405, note 2.

general, and has now almost ripened into a custom; examples are the Austrian cruiser "Novara" (1859), and the Swedish cruiser "Vega" (1878). It must be specially observed that it matters not whether the vessel concerned is a private or a public vessel.[1]

Immunity of Fishing-boats.

§ 187. According to a general custom, which is, however, not recognised by Great Britain, coast fishing-boats, in contradistinction to boats engaged in deep-sea fisheries, are granted immunity from attack and seizure as long and in so far as they are unarmed and are innocently employed in catching and bringing in fish.[2] Already in the sixteenth century treaties were concluded between single States stipulating such immunity to each other's fishing-boats for the time of war. But throughout the seventeenth and eighteenth centuries there are instances enough of a contrary practice, and Lord Stowell refused[3] to recognise in strict law any such exemption, although he recognised a rule of comity to that extent. Great Britain has hitherto always taken the standpoint that any immunity granted by her to fishing-boats was a relaxation[4] of strict right in the interest of humanity, but revocable at any moment, and that her cruisers were justified in seizing enemy fishing boats unless prevented therefrom by special instructions on the part of the Admiralty.[5] It ought not, therefore, to be maintained that immunity of fishing-boats is granted by

[1] See U.S. Naval War Code, article 13. The matter is discussed at some length by Kleen, II. § 210, pp. 503-505. Concerning the case of the English explorer Flinders, who sailed with the vessel Investigator from England, but exchanged her for the Cumberland, which was seized in 1803 by the French at Port Louis, in Mauritius, as she was not the vessel to which a safe-conduct was given, see Lawrence, § 105.

[2] The Paquette Habana, 175, United States, 677. See U.S. Naval War Code, article 14; Japanese Prize Law, article 3 (1).

[3] Young Jacob and Joanna, 1 Rob. 20.

[4] See Hall, § 148.

[5] See Holland, Prize Law, § 36.

a rule of universal International Law. And it must be specially observed that boats engaged in deep-sea fisheries are not exempt from capture even according to the practice of those States which grant immunity to coast fishing-boats.

Immunity of Merchantmen at the Outbreak of War on their Voyage to and from a Belligerent's Port.

§ 188. During the nineteenth century belligerents have several times at the outbreak of war decreed that enemy merchantmen, which were on their voyage to one of the former's ports at the outbreak of war, should not be attacked and seized during the period of their voyage to and from such port. Thus, at the outbreak of the Crimean War, Great Britain and France decreed such immunity for Russian vessels, Germany did the same with regard to French vessels in 1870,[1] Russia with regard to Turkish vessels in 1877, the United States with regard to Spanish vessels in 1898, Russia and Japan with regard to each other's vessels in 1904. But there is no rule of International Law which obliges a belligerent to grant such days of grace, and it is probable that in future wars days of grace will not at all be granted. The reason is that the steamboats of many countries are now built, according to an arrangement with the Government of their home State, on special designs which make them easily alterable into cruisers, and that a belligerent fleet can nowadays not for long remain effective without being accompanied by a train of transport-vessels, colliers, repairing-vessels, and the like.[2]

Vessels in Distress.

§ 189. Some instances have occurred when enemy vessels which were forced by stress of weather to seek refuge in a belligerent's harbour were granted

[1] See, however, above, p. 185.

[2] This point is ably argued by Lawrence, War, pp. 54–55.

exemption from seizure.[1] Thus, when in 1746, during war with Spain, the "Elisabeth," a British man-of-war, was forced to take refuge in the port of Havanna, she was not seized, but was offered facility for repairing damages and furnished with a safe-conduct as far as the Bermudas. Thus, further, when in 1799, during war with France, the "Diana," a Prussian merchantman, was forced to take refuge in the port of Dunkirk and seized, she was restored by the French Prize Court. But all these and other cases have not created any rule of International Law granting immunity from attack and seizure to vessels in distress, and no such rule is likely to grow up, especially not as regards men-of-war.

Immunity of Hospital and Cartel Ships.

§ 190. According to the Hague Convention, which adapted the principles of the Geneva Convention to warfare on sea, hospital ships are inviolable, and may therefore be neither attacked nor seized; see below in §§ 204–209. Concerning the immunity of cartel ships, see below in § 225.

Immunity of Mail-boats.

§ 191. No general rule of International Law exists granting enemy mail-boats immunity from attack and seizure, but the single States have frequently stipulated such immunity in the case of war by special treaties.[2] Thus, for instance, Great Britain and France have, by article 13 of the Convention of London of 1833,[3] stipulated that all mail-boats between Great Britain and France shall continue navigation in time of war between the parties until special notice is given by either of the parties that the service is to be discontinued, and that before such notice the mail-boats shall enjoy immunity from attack and seizure.

[1] See Ortolan, II. pp. 286–291, 505–507. Kleen, II. § 210, pp. 492–494.

[2] See Kleen, II. § 210, pp.

[3] See Martens, N.R., XIII p. 105.

III

Appropriation and Destruction of Enemy Merchantmen

Hall, §§ 149-152, 171, 269—Lawrence, §§ 206-209—Phillimore, III. §§ 345-381—Twiss, II. §§ 72-97—Halleck, II. pp. 362-431, 510-526—Taylor, §§ 552-567—Wharton, III. § 345—Wheaton §§ 355-394—Bluntschli, §§ 672-673—Heffter, §§ 137-138—Geffcken in Holtzendorff, IV. pp. 588-596—Ullmann, § 161—Bonfils, Nos. 1396-1440—Despagnet, Nos. 657-670—Rivier, II. § 66—Calvo, IV. §§ 2294-2366, V. §§ 3004-3034—Fiore, III. Nos. 1426-1443—Martens, II. §§ 125-126—Pillet, pp. 342-352—Perels, §§ 36, 55-58—Testa, pp. 147-160—Valin, "Traité des prises," 2 vols. (1758-60), and "Commentaire sur l'ordonnance de 1681," 2 vols. (1766)—Pistoye et Duverdy, "Traité des prises maritimes," 2 vols. (1855)—Upton, "The Law of Nations affecting Commerce during War" (1863)—Boeck, Nos. 156-209, 329-380—Dupuis, Nos. 96-149, 282-301. See also the literature quoted by Bonfils at the commencement of No. 1396.

Prize Courts.

§ 192. It has already been stated above, in § 185, that the capture of an enemy private vessel has to be confirmed by a Prize Court, and that it is only through the latter's adjudication that the vessel becomes finally appropriated. The origin [1] of Prize Courts is to be traced back to the end of the Middle Ages. During the Middle Ages, after the Roman Empire had broken up, a state of lawlessness established itself on the High Seas. Piratical vessels of the Danes covered the North Sea and the Baltic, and navigation of the Mediterranean Sea was threatened by Greek and Saracen pirates. Merchantmen, therefore, associated themselves for mutual protection and sailed as a merchant fleet under a specially elected chief, the so-called admiral. They also occasionally sent out a fleet of armed vessels for the purpose of sweeping pirates from certain parts of

[1] I follow the excellent summary of the facts given by Twiss, II. §§ 74-75.

the High Seas. Piratical vessels and goods which were captured were divided among the captors according to a decision of their admiral. During the thirteenth century the maritime States of Europe endeavoured to keep order on the Open Sea themselves. By-and-by armed vessels were obliged to be furnished with Letters Patent or Letters of Marque from the Sovereign of a maritime State, and their captures submitted to an official control of such State as had furnished them with their letters. A board, called the Admiralty, was instituted by maritime States, and officers of that Board of Admiralty exercised control over the armed vessels and their captures, inquiring in each case into the legitimation of the captor and the nationality of the captured vessel and her goods. And when modern International Law had grown up, it was a recognised customary rule that in time of war the Admiralty of maritime belligerents should be obliged to institute a Court or Courts for the purpose of deciding in each case of a prize captured by public vessels or privateers the question whether the capture was lawful or not. These Courts were called Prize Courts. This institution has come down to our times, and nowadays all maritime States either constitute permanent Prize Courts, or appoint them specially in each case of an outbreak of war. The whole institution is essentially one in the interest of neutrals, since belligerents want to be guarded by a decision of a Court against claims of neutral States regarding alleged unjustified capture of neutral vessels and goods. The capture of any private vessel, whether *prima facie* belonging to an enemy or a neutral, must, therefore, be submitted to a Prize Court. But it must be emphasised that Prize Courts are not International Courts, but National Courts instituted by

Municipal Law, and that the law they administer is Municipal Law,[1] based on custom, statutes, or special regulations of their State. Every State is bound by International Law to enact only such statutes and regulations[2] for its Prize Courts as agree with International Law. A State may, therefore, instead of special regulations, directly order its Prize Courts to apply the rules of International Law, and it is understood that, when no statutes are enacted or regulations are given, Prize Courts have to apply International Law. Prize Courts may be instituted by belligerents in any part of their territory or the territories of allies, but not on neutral territory. It would nowadays constitute a breach of neutrality on the part of a neutral State to allow the institution on its territory of a Prize Court.[3]

Conduct of Prize to port of Prize Court.

§ 193. As soon as a vessel is seized she must be conducted to a port where a Prize Court is sitting. As a rule the officer and the crew sent on board the prize by the captor will navigate the prize to the port. This officer can ask the master and crew of the vessel to assist him, but, if they refuse, they cannot be compelled thereto. The captor need not accompany the prize to the port. In the exceptional case, however, where an officer and crew cannot be sent on board and the captured vessel is ordered to lower her flag and to steer according to orders, the captor must conduct the prize to the port. To which port a prize is to be taken is not for International Law to

[1] See below, § 434.

[2] The constitution and procedure of Prize Courts in Great Britain are settled by the Naval Prize Act, 1864 (27 and 28 Vict. ch. 25), and the Prize Courts Act, 1894 (57 and 58 Vict. ch. 39). It should be mentioned that the Institute of International Law has in various meetings occupied itself with the whole matter of capture, and adopted a body of rules in the ' Règlement international des Prises Maritimes," which represent a code of Prize Law; see Annuaire, IX. pp. 218–243, but also XVI. pp. 44 and 311.

[3] See below § 327.

determine; the latter says only that the prize must be taken straight to a port of a Prize Court, and only in case of distress or necessity is delay allowed. If the neutral State concerned gives the permission, the prize may, in case of distress or in case she is in such bad condition as prevents her from being taken to a port of a Prize Court, be taken to a near neutral port, and, if admitted, the capturing man-of-war as well as the prize enjoy there the privilege of exterritoriality. But as soon as circumstances allow, the prize must be conducted from the neutral port to that of the Prize Court, and only if the condition of the prize does not at all allow this, may the Prize Court give its verdict in the absence of the prize after the ship papers of the prize and witnesses have been produced before it. The whole of the crew of the prize are, as a rule, to be kept on board and to be brought before the Prize Court. But if this is impracticable, several important members of the crew, such as the master, mate, or supercargo, must be kept on board, whereas the others may be removed and forwarded to the port of the Prize Court by other means of transport. The whole of the cargo is, as a rule, also to remain on board the prize. But if the whole or part of the cargo is in a condition which prevents it from being sent to the port of the Prize Court, it can, according to the merits of the case, either be destroyed or sold in the nearest port, and in the latter case an account of the sale has to be sent to the Prize Court. All neutral goods amongst the cargo are also to be taken to the port of adjudication, although they have now, according to the Declaration of Paris, to be restored to their neutral owners. But if such neutral goods are not in a condition to be taken to the port of

adjudication, they may likewise be sold or destroyed, as the case may be.

Destruction of Prize.

§ 194. Since through adjudication by the Prize Courts the property of captured enemy private vessels becomes finally transferred to the belligerent whose forces made the capture, it is evident that then the captured vessel as well as her cargo may be destroyed. On the other hand, it is likewise evident that, since a verdict of a Prize Court is necessary for the appropriation of the prize to become final, a captured merchantman must as a rule not be destroyed instead of being conducted to the port of a Prize Court. There are, however, exceptions to the rule, but no unanimity exists in theory and practice as regards those exceptions. Whereas some[1] consider the destruction of a prize allowable only in case of imperative necessity, others[2] allow it in nearly every case of convenience. Thus, the Government of the United States of America, on the outbreak of war with England in 1812, instructed the commanders of her vessels to destroy at once all captures, the very valuable excepted, because a single cruiser, if ever so successful, could man a few prizes only, but by destroying each capture would be able to continue capturing, and thereby diminish constantly the enemy merchant fleet.[3] And during the Civil War in America the cruisers of the Southern Confederated States destroyed all enemy prizes because there was no port open for them to bring prizes to. According to British practice,[4] the captor is allowed to destroy the prize in only two cases—namely, first, when the prize

[1] See, for instance, Bluntschli, § 672.

[2] See, for instance, Martens, § 126, who moreover makes no difference between the prize being an enemy or a neutral ship.

[3] U.S. Naval War Code (article 14) allows the destruction "in case of military or other necessity."

[4] See Holland, Prize Law, §§ 303-304.

is in such a condition as prevents her from being sent to any port of adjudication; and, secondly, when the capturing vessel is unable to spare a prize crew to navigate the prize into such a port. The *Règlement international des prises maritimes* of the Institute of International Law enumerates by its § 50 five cases in which destruction of the capture is allowed —namely (1) when the condition of the vessel and the weather make it impossible to keep the prize afloat; (2) when the vessel navigates so slowly that she cannot follow the captor and is therefore exposed to an easy recapture by the enemy; (3) when the approach of a superior enemy force creates the fear that the prize might be recaptured by the enemy; (4) when the captor cannot spare a prize crew; (5) when the port of adjudication to which the prize might be taken is too far from the spot where the capture was made. Be that as it may,[1] in every case of destruction of the vessel the captor must remove crew, ship papers, and, if possible, the cargo, before the destruction of the prize, and must afterwards send crew, papers, and cargo to a port of a Prize Court for the purpose of satisfying the latter that both the capture and the destruction were lawful.

But if destruction of a captured enemy merchantman can exceptionally be lawful, the question as to indemnities to be paid to the neutral owners of goods carried by the destroyed vessel requires attention. It seems to be obvious that, if the destruction of the vessel herself was lawful, and if it was not possible to remove her cargo, no indemnities need be paid. An illustrative case happened during the Franco-German War. On October 21, 1870, the French cruiser

[1] The whole matter is thoroughly discussed by Boeck, Nos. 268–285; Dupuis, Nos. 262–268, and Calvo, V. §§ 3028–3034. As regards destruction of a neutral prize, see below, § 431.

"Dessaix" seized two German merchantmen, the "Ludwig" and the "Vorwärts," but burned them because she could not spare a prize crew to navigate the prizes into a French port. The neutral owners of part of the cargo claimed indemnities, but the French Conseil d'État refused to grant indemnities on the ground that the action of the captor was lawful.[1]

Ransom of Prize.

§ 195. Although prizes have regularly to be brought before a Prize Court, International Law nevertheless does not forbid the ransoming of the captured vessel either at once after the capture or after she has been conducted to the port of a Prize Court, but before the Court has given its verdict. However, the practice of accepting and paying ransom, which grew up in the seventeenth century, is in many countries now prohibited by Municipal Law. Thus, for instance, Great Britain by section 45 of the Naval Prize Act, 1864, prohibits ransoming except in such cases as may be specially provided for by an Order of the King in Council. Where ransom is accepted, a contract of ransom is entered into by the captor and the master of the captured vessel; the latter gives a so-called ransom bill to the former, in which he promises the amount of the ransom. He is given a copy of the ransom bill for the purpose of a safe-conduct preventing his vessel from again being captured, under the condition that he keeps the course to such port as is agreed upon in the ransom bill. To secure the payment of ransom, an officer of the captured vessel can be retained as hostage, otherwise the whole of the crew is to be liberated with the vessel, ransom being an equivalent for both the restoration of the prize and the release of her crew from captivity. As long as the

[1] See Calvo, V. § 3033; Dupuis, No. 262; Hall, § 269.

ransom bill is not paid, the hostage can be kept in captivity. But it is exclusively a matter of Municipal Law of every State to determine whether or not the captor can sue upon the ransom bill, if the ransom is not voluntarily paid.[1] Should the capturing vessel, with the hostage or the ransom bill on board, be captured herself and thus become a prize of the enemy, the hostage is liberated, the ransom bill loses its effect, and it need not now be paid.[2]

Loss of Prize, especially Recapture.

§ 196. A prize is lost—(1) when the captor intentionally abandons her, (2) when she escapes through being rescued by her own crew, or (3) when she is recaptured. Just as through capture the prize becomes, according to International Law, the property of the belligerent whose forces made the prize, provided a Prize Court confirms the capture, so such property is lost when the prize vessel becomes abandoned, or escapes, or is recaptured. And it seems to be obvious, and everywhere recognised by Municipal Law, that as soon as a captured enemy merchantman succeeds in escaping, the proprietorship of the former owners revives *ipso facto*. But the case is different when a captured vessel, whose crew remain prisoners on board the capturing vessel, is abandoned and afterwards met and taken possession of by a neutral vessel or by a vessel of her home State. It is certainly not for International Law to determine whether or not the original proprietorship revives through abandonment. This is a matter of Municipal Law.

[1] See Hall, § 151, p. 479:—"The English Courts refuse to accept such arrangements (for ransom) from the effect of the rule that the character of an alien enemy carries with it a disability to sue, and compel payment of the debt indirectly through an action brought by the imprisoned hostage for the recovery of his freedom." The American Courts, in contradistinction to the British, recognise ransom bills.

[2] The matter of ransom is treated with great lucidity by Twiss, II. §§ 180–183; Boeck, Nos. 257–267; Dupuis, Nos. 269–277.

The case of recapture is likewise different from escape. Here too Municipal Law has to determine whether or not the former proprietorship revives, since International Law lays down the rule only that recapture takes the vessel out of the property of the enemy and brings her into the property of the belligerent whose forces made the recapture. Municipal Law of the individual States has settled the matter differently. Thus, Great Britain, by section 40 of the Naval Prize Act, 1864, enacted that the recaptured vessel, except when she has been used by the captor as a ship of war, shall be restored to her former owner on his paying one-eighth to one-fourth, as the Prize Court may award, of her value as prize salvage, no matter if the recapture was made before or after the enemy Prize Court had confirmed the capture. Other States restore a recaptured vessel only when the recapture was made within twenty-four hours[1] after the capture occurred, or before the captured vessel was conducted into an enemy port, or before she was condemned by an enemy Prize Court.

Fate of Prize.

§ 197. Through being captured and afterwards condemned by a Prize Court, a captured enemy vessel and captured enemy goods become the property of the belligerent whose forces made the capture. What becomes of the prize after the condemnation is not for International, but for Municipal Law to determine. A belligerent can hand the prize over to the officers and crew who made the capture, or can keep her altogether for himself, or can give a share to those who made the capture. As a rule, prizes are sold after they are condemned, and the whole or a part of the net proceeds is distributed among the officers and crew who made the capture. For Great

[1] So, for instance, France; see Dupuis, Nos. 278–279.

Britain this distribution is regulated by the "Royal Proclamation as to Distribution of Prize Money" of August 3, 1886.[1] There is no doubt whatever that, if a neutral subject buys a captured ship after her condemnation, she cannot be attacked and captured by the belligerent to whose subject she formerly belonged, although, if she is bought by an enemy subject and afterwards captured, she might be restored[2] to her former owner.

Vessels belonging to Subjects of Neutral States, but sailing under Enemy Flag.

§ 198. It has been already stated above in § 92 that merchantmen owned by subjects of neutral States but sailing under enemy flag are vested with enemy character. It is, therefore, evident that they may be captured and condemned. As at present no non-littoral State has, in fact, a maritime flag, vessels belonging to subjects of such States are forced to navigate under the flag of another State,[3] and they are, therefore, in case of war exposed to capture. As this is rather hard, it may, perhaps, be expected that in future belligerents will instruct their Prize Courts to release such vessels provided the owners furnish proof of the neutral ownership and the necessity for them to sail under the enemy's flag. A remarkable case occurred during the Franco-German War. In January 1871 the "Palme," a vessel belonging to the Missionary Society of Basle, was captured by a French man-of-war, and condemned by the Prize Court of Bordeaux. The owners appealed and the French Conseil d'État set the vessel free, because equity demanded the fact to be taken into consideration that Swiss subjects owning vessels were obliged to have them sailing under the flag of another State. This Court further remarked that, although

[1] See Holland, Prize Law, pp. 142–150.

[2] See above, § 196.

[3] See above, vol. I. § 261.

a man-of-war would always be justified in capturing such a vessel on account of her ship papers, the owners would be authorised to furnish the proof of the neutral ownership of the vessel, and of the absence of *mala fides* in having her sailing under the enemy flag.[1]

Effect of Sale of Enemy Vessels during War.

§ 199. Since enemy vessels are liable to capture, the question must be taken into consideration whether the fact that an enemy vessel has been sold during the war to a subject of a neutral or to a subject of the belligerent State whose forces seized her, has the effect of excluding her appropriation.[2] It is obvious that, if the question is answered in the affirmative, the owners of enemy vessels can evade the danger of having their property captured by selling their vessels. Now there is no general rule of International Law which answers the question. The rule ought to be that, since commerce between belligerents' subjects and neutral subjects is not at all prohibited through the outbreak of war, a *bona fide* sale of enemy vessels should have the effect of freeing such vessels from appropriation, as they are, in fact, no longer enemy property. But the practice among the States varies. Thus, France[3] does not recognise any such sale after the outbreak of war. On the other hand, the practice of Great Britain[4] and the United States of America[5] recognises such sale, provided it was made *bona fide*, and the new owner has actually taken possession of the sold vessel. Therefore, if the sale was contracted *in*

[1] See Rivier, II. pp. 343-344, and Dupuis, No. 158.

[2] See Holland, Prize Law, § 19; Hall, § 171; Twiss, II. §§ 162-163; Phillimore, III. § 386; Boeck, Nos. 178-180; Dupuis, Nos. 117-129; Bonfils, Nos. 1344-1349.

[3] See Dupuis, Nos. 96-97.

[4] The Sechs Geschwistern, 4 Rob. 100; the Jemmy, 4 Rob. 31; the Omnibus, 4 Rob. 71.

[5] The Benito Estenger, 176, United States, 568.

transitu, the vessel having started her voyage as an enemy vessel, the sale is not recognised, when the vessel is detained on her voyage, before the new owner has actually taken possession of her.[1]

Goods sold by and to Enemy Subjects during War.

§ 200. If a captured enemy vessel carries goods consigned by enemy subjects to subjects of neutral States, or to subjects of the belligerent whose forces captured the vessel, they may not be appropriated, provided the consignee can prove that he is the owner. As regards such goods found on captured enemy merchantmen as are consigned to enemy subjects but have been sold *in transitu* to subjects of neutral States, there is no unanimous practice of the different States in existence.[2] British[3] and American[4] practice refuse to recognise such sale *in transitu* under all circumstances and conditions, if the vessel concerned is captured before the neutral buyer has actually taken possession of the goods. On the other hand, French[5] practice recognises such sale *in transitu* provided it can be proved that the transaction was made *bona fide*.

[1] The Vrow Margaretha, 1 Rob. 336; the Jan Frederick, 5 Rob. 128.

[2] See Hall, § 172; Twiss, II. §§ 162, 163; Phillimore, III. §§ 387, 388; Dupuis, Nos. 141–149; Boeck, Nos. 182, 183.

[3] The Jan Frederick, 5 Rob. 128.

[4] The Ann Green, 1 Gallison, 274.

[5] See Boeck, l.c., No. 162; Dupuis, No. 142.

IV

Violence against Enemy Persons

See the literature quoted above at the commencement of § 107. See also Bonfils, No. 1273.

Violence against Combatants.

§ 201. As regards killing and wounding combatants in sea warfare and the means used for that purpose, customary rules of International Law are in existence according to which only those combatants can be killed or wounded who are able and willing to fight or who resist capture. Men disabled by sickness or wounds, or such men as lay down arms and surrender or do not resist capture, must be given quarter, except in a case of imperative necessity or of reprisals. Poison, and such arms, projectiles, and materials as cause unnecessary injury, are prohibited, as is also killing and wounding in a treacherous way.[1] The Declaration of St. Petersburg[2] and the Hague Declaration prohibiting the use of expanding (Dum-Dum)[3] bullets, apply to sea warfare as well as to land warfare, as also did the now expired Hague Declarations concerning projectiles and explosives launched from balloons, and projectiles diffusing asphyxiating or deleterious gases.[4]

All combatants, further, all officers and members of the crews of merchantmen can be made prisoners of war.[5] As soon as such prisoners are landed their

[1] See the corresponding rules for warfare on land, which are discussed above in §§ 108–110. See also U.S. Naval War Code, article 3.

[2] See above, § 111.

[3] See above, § 112.

[4] See above, §§ 113 and 114.

[5] This is pretty generally recognised, but was refused recognition by Count Bismarck during the Franco-German War (see below, § 249) and is still denied by some German publicists, as, for instance, Lueder in Holtzendorff, IV. p. 479, note 6.

treatment falls under articles 4–20 of the Hague Regulations. As long, however, as they are on board, the old customary rule of International Law, that prisoners must be treated humanely,[1] and not like convicts, must be complied with. The Hague Convention for the adaptation of the Geneva Convention to sea warfare enacts, however, some rules concerning the shipwrecked, the wounded, and the sick who through falling into the hands of the enemy become prisoners of war.[2]

Violence against Non-combatant Members of Naval Forces.

§ 202. Just as military forces consist of combatants and non-combatants, so do naval forces of belligerents. Non-combatants, as, for instance, stokers, surgeons, chaplains, members of the hospital staff, and the like, who do not take part in the fighting, may not be attacked directly and killed or wounded.[3] But they are exposed to all injuries indirectly resulting from attacks on and by their vessels. And they can certainly be made prisoners of war, with the exception of members of the religious, medical, and hospital staff, who are inviolable according to article 7 of the Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention.[4]

Violence against Enemy Individuals not belonging to the Naval Forces.

§ 203. Since and so far as enemy individuals who are on board an attacked or seized enemy vessel and do not belong to the naval forces do not take part in the fighting, they may not directly be attacked and killed or wounded, although they are exposed to all injury indirectly resulting from an attack on or by their vessel. If they are mere private individuals, they can only exceptionally and under the same

[1] See Holland, Prize Law, § 249, and U.S. Naval War Code, articles 10, 11.

[2] See below, § 205.

[3] See U.S. Naval War Code, article 3.

[4] See below, § 209.

circumstances as private individuals on occupied territory be made prisoners of war.[1] But they are nevertheless, for the time they are on board the captured vessel, under the discipline of the captor. All restrictive measures against them which are necessary are therefore lawful, as are also punishments, in case they do not comply with lawful orders of the commanding officer. If they are enemy officials in important positions,[2] they can be made prisoners of war.

V

Treatment of Wounded and Shipwrecked.

Perels, § 37—Pillet, pp. 188-191—Bonfils, No. 1280—U.S. Naval War Code, articles 21-29—Ferguson, "The Red Cross Alliance at Sea" (1871)—Houette, "De l'extension des principes de la Convention de Genève aux victimes des guerres maritimes" (1892)—Cauwès, "L'extension des principes de la Convention de Genève aux guerres maritimes" (1899)—Holls, "The Peace Conference at the Hague" (1900), pp. 120-132—Fauchille in R.G., VI. (1899), pp. 291-302—Bayer, in R.G., VIII. (1901), pp. 225-230. See also the literature quoted above at the commencement of § 118.

Adaptation of Geneva Convention to Sea Warfare.

§ 204. Soon after the Geneva Convention the necessity of adapting its principles to naval warfare was generally recognised, and among the non-ratified additional articles to the Geneva Convention signed at the Congress convened in 1868 at Geneva were nine which undertook such an adaptation. But it was not until the Hague Peace Conference in 1899 that an adaptation came into legal existence. This adaptation is contained in the "Convention,[3] for the

[1] See U.S. Naval War Code, article 11, and above, § 116.

[2] See above, § 117.

[3] Martens, N.R.G., 2nd ser. XXVI. p. 979.

Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864." This Convention contains fourteen articles, which not only provide rules regarding the treatment of wounded, sick, and shipwrecked sailors and marines, but, in the interest of such wounded, sick, and shipwrecked individuals, provide also rules regarding (1) hospital ships, (2) neutral ships taking or having on board belligerents' wounded, sick, or shipwrecked, (3) further, the religious, medical, and hospital staff of captured ships. The original Convention contained also, in its tenth article, the following stipulation:—"The shipwrecked, wounded, or sick, who are landed at a neutral port with the consent of the local authorities, must, failing a contrary arrangement between the neutral State and the belligerents, be guarded by the neutral State, so that they cannot again take part in the military operations. The expenses of entertainment and internment shall be borne by the State to which the shipwrecked, wounded, or sick belong." But as Great Britain, Germany, the United States, and Turkey in signing the Convention reserved special liberty of action with regard to this tenth article, all the parties agreed upon the suggestion of Russia to ratify the Convention with exclusion of article 10, by inserting in the act of ratification a copy of the Convention in which the text of article 10 is replaced by the word *Exclu.*[1] Thus article 10 was dropped, but the original numbering of the articles remains.

The Wounded, Sick, and Shipwrecked.

§ 205. Enemy sailors and soldiers who are taken on board when sick or wounded must be protected and tended by the captors (article 8). All enemy shipwrecked, wounded, or sick, who fall into the

[1] See above, vol. I. § 517, note 4, and Holls, l.c., p. 128.

hands of a belligerent are prisoners of war. It is left to the captor to determine whether they are to be kept on board or to be sent to a port of his own country, or neutral port, or even a hostile port; and in the last case such repatriated prisoners must be prevented by their Government from again serving in the war (article 9).

Hospital Ships.

§ 206. Articles 1 to 5 deal with so-called hospital ships, of which three different kinds are distinguished —namely (1) military hospital ships, (2) hospital ships equipped by private individuals or relief societies of the belligerents, and (3) hospital ships equipped by private neutral individuals and neutral relief societies.

Military hospital ships are ships constructed or assigned by States specially and solely for the purpose of assisting the wounded, sick, and shipwrecked. Their names must be communicated to the belligerents at the commencement of or during hostilities, and in any case before they are employed. They must be respected by the belligerents, they cannot be captured while hostilities last, and they are not on the same footing as men-of-war during their stay in a neutral port.

Hospital ships equipped wholly or in part at the cost of private individuals or officially recognised relief societies of the belligerents must be respected by either belligerent, and are exempt from capture, provided their home State has given them an official commission and has notified their names to the other belligerent at the commencement of or during hostilities, and in any case before they are employed. They must, further, be furnished with a certificate from the competent authorities declaring that they had been under the latter's control while fitting out and on final departure.

Hospital ships equipped wholly or in part at the cost of private individuals or officially recognised relief societies of neutral States must likewise be respected, and are exempt from capture, provided their home State has given them an official commission and notified their names to the belligerents at the commencement of or during hostilities, and in any case before they are employed.

All military and other hospital ships must afford relief and assistance to the wounded, sick, and shipwrecked of either belligerent. The respective Governments are prohibited from using these ships for any military purpose. The commanders of these vessels must not in any way hamper the movements of the combatants, and during and after an engagement they act at their own risk and peril. Both belligerents have a right to control and visit all military and other hospital ships, to refuse their assistance, to order them off, to make them take a certain course, to put a commissioner on board, and, lastly, to detain them temporarily, if important circumstances require this. In case a hospital ship receives orders from a belligerent, these orders must, as far as possible, be inscribed in the ship papers.

For the purpose of defining the status of hospital ships when entering neutral ports an International Conference met at the Hague in 1904, where Germany, Austria-Hungary, Belgium, China, Korea, Denmark, Spain, the United States of America, France, Greece, Guatemala, Italy, Japan, Luxemburg, Mexico, Holland, Persia, Portugal, Roumania, Russia, Servia, and Siam were represented. Great Britain, however, did not take part. The following is the text of the six articles of the Convention signed by all the representatives :—

Article 1.—Hospital ships fulfilling the conditions prescribed in articles 1, 2, and 3 of the Convention concluded at the Hague on July 27, 1899, for the adaptation of the principles of the Geneva Convention of August 22, 1864, to naval warfare shall in time of war be exempt in the ports of the contracting parties from all dues and taxes imposed on vessels for the benefit of the State.

Article 2.—The provision contained in the preceding article shall not prevent the exercise of the right of search and other formalities demanded by the fiscal and other laws in force in the said ports.

Article 3.—The regulation laid down in article 1 is binding only upon the contracting Powers in case of war between two or more of themselves. The said rule shall cease to be obligatory as soon as in a war between any of the contracting Powers a non-contracting Power shall join one of the belligerents.

Article 4.—The present Convention, which bears date of this day and may be signed up to October 1, 1905, by any Power which shall have expressed a wish to do so, shall be ratified as speedily as possible. The ratifications shall be deposited at the Hague. On the deposit of the ratifications, a *procès-verbal* shall be drawn up, of which a certified copy shall be conveyed by diplomatic channels, after the deposit of each ratification, to all the contracting Powers.

Article 5.—Non-signatory Powers will be allowed to adhere to the present convention after October 1, 1905. For that purpose they will have to make known the fact of their adhesion to the contracting Powers by means of a written notification addressed to the Government of the Netherlands, which will be communicated by that Government to all the other contracting Powers.

Article 6.—In the event of any of the high contracting parties denouncing the present Convention, the denunciation shall only take effect after notification has been made in writing to the Government of the Netherlands and communicated by that Government at once to all the other contracting Powers. Such denunciation shall be

effective only in respect of the Power which shall have given notice of it.

Distinctive Colour and Emblem of Hospital Ships.

§ 207. All military hospital ships must be painted white outside with a horizontal band of green about one mètre and a half in breadth. Other hospital ships must also be painted white outside, but with a horizontal band of red. All boats and small craft of hospital ships used for hospital work must also be painted white. And besides being obliged to be painted in a distinguishing colour, all military and other hospital ships (article 5) must hoist, together with their national flag, the white flag with a red cross provided by the Geneva Convention. Although here too the red cross is expressly stipulated as the distinctive emblem, there is no objection to non-Christian States who object to the cross on religious grounds adopting another emblem. The committee of the Hague Peace Conference, which prepared the Convention for the adaptation of the principles of the Geneva Convention to naval warfare, took official notice of a declaration of the Persian delegate that Persia would, instead of the red cross, adopt a red sun, and of a declaration of the Siamese representative that Siam reserved the right to adopt, instead of the red cross, a symbol sacred in the Buddhistic cult. And it is certain that Turkey will here too adopt the red crescent instead of the cross.[1]

Neutral Ships assisting the Wounded.

§ 208. Neutral merchantmen, yachts, and other vessels, which have or take on board sick, wounded, or shipwrecked of the belligerents, cannot be captured for so doing, although they are liable to capture for any violation of neutrality they may have committed (article 6). By this rule a belligerent is prevented from capturing the merchantmen concerned for

[1] See above, § 123, and Holls, l.c., pp. 125–126.

so-called analogous of contraband—that is, carriage of persons or despatches for the enemy.[1] But the convention does not comprise any rule concerning the question what is to be done with the rescued men, whether wounded or sick or simply shipwrecked and therefore able to fight again after having been rescued. Must they be given up on request to the other party? If not, can they be allowed to return home? Are they bound not to take up arms again during the war? The United States proposed some additional articles to the Convention which would have settled the matter, but withdrew the proposal afterwards.[2] The question is therefore not settled, and belligerents can act at will in the matter.

That neutral men-of-war cannot be seized for taking shipwrecked, wounded, and sick on board is a matter of course. But as regards this case too, the question of the final disposal of the rescued is not settled, especially as the original article 10 of the Convention has been dropped before ratification.[3]

The Religious, Medical, and Hospital Staff.

§ 209. Whatever vessel is captured, her religious, medical, and hospital staff is inviolable, and its members cannot be made prisoners of war, but they must continue to discharge their duties while necessary. And if they do this, the belligerent into whose hands they have fallen has to pay them their salaries. They can leave the ship, when the commander-in-chief considers it possible, and on leaving they are allowed to take with them all surgical articles and instruments which are their private property (article 7).

[1] See below, § 408.
[2] See Holls, l.c., p. 131.
[3] See below, § 348, and Lawrence, War, pp. 63–75.



VI

Espionage, Treason, Ruses

See the literature quoted above at the commencement of §§ 159 and 163.

Espionage and Treason.

§ 210. Espionage and treason do not play the same part in sea warfare as in land warfare,[1] still they may occur and be made use of by belligerents. But it must be specially observed that, since the Hague Regulations deal only with land warfare, the legal necessity of trying a spy by court-martial according to article 30 of these Regulations does not exist for sea warfare, although such trial by court-martial is advisable.

Ruses.

§ 211. Ruses are customarily allowed within the same limits in sea warfare as in land warfare, perfidy being excluded. As regards the use of a false flag, it is by most publicists considered perfectly lawful for a man-of-war to use a neutral's or the enemy's flag (1) when chasing an enemy vessel, (2) when trying to escape, and (3) for the purpose of drawing an enemy vessel into action.[2] On the other hand, it

[1] See above, §§ 159–162.

[2] The use of a false flag on the part of a belligerent man-of-war is analogous to the controverted use of the enemy flag and the like in land warfare; see above, § 164. British practice—see Holland, Prize Law, § 200—permits the use of false colours. U.S. Naval War Code, article 7, forbids it now altogether, whereas as late as 1898, during the war with Spain in consequence of the Cuban insurrection, two American men-of-war did make use of the Spanish flag (see Perels, p. 183). And during the war between Turkey and Russia, in 1877, Russian men-of-war in the Black Sea made use of the Italian flag (see Martens, II. § 103, p. 566). The question of the permissibility of the use of a neutral or enemy flag is answered in the affirmative, among others, by Ortolan, II. p. 29; Fiore, III. No. 1340; Perels, § 35, p. 183; Pillet, p. 116; Bonfils, No. 1274; Calvo, IV. 2106; Hall, § 187. See also Pillet in R.G., V. (1898), pp. 444–451. But see the arguments against the use of a false flag in Pradier-Fodéré, VI. No. 2760.

is universally agreed that immediately before an attack a vessel must fly her national flag. Halleck (I. p. 568) relates the following instance: In 1783 the "Sybille," a French frigate of thirty-eight guns, enticed the British man-of-war "Hussar" by displaying the British flag and intimating herself to be a distressed prize of a British captor. The "Hussar" approached to succour her, but the latter at once attacked the "Hussar" without showing the French flag. She was, however, overpowered and captured, and the commander of the "Hussar" publicly broke the sword of the commander of the "Sybille," whom he justly accused of perfidy, although the French commander was acquitted when subsequently brought to trial by the French Government. Again, Halleck (I. p. 568) relates: In 1813 two merchants of New York carried out a plan for destroying the British man-of-war "Ramillies" in the following way. A schooner with some casks of flour on deck was expressly laden with several casks of gunpowder having trains leading from a species of gunlock, which, upon the principle of clock-work, went off at a given period after it had been set. To entice the "Ramillies" to seize her, the schooner came up, and the "Ramillies" then sent a boat with thirteen men and a lieutenant to cut her off. Subsequently the crew of the schooner abandoned her and she blew up with the lieutenant and his men on board.

Vattel (III. § 178) relates the following case of perfidy: In 1755, during war between Great Britain and France, a British man-of-war appeared off Calais, made signals of distress for the purpose of soliciting French vessels to approach to her succour, and seized a sloop and some sailors who came to bring

her help. Vattel is not certain himself whether this case is a fact or fiction. But be that as it may, there is no doubt that, if the case be true, it is an example of perfidy which is not allowed.

VII

Requisitions, Contributions, Bombardment

Hall, § 140*—Lawrence, § 229—Taylor, § 499—Bonfils, No. 1277—Despagnet, No. 616—Pillet, p. 117—Perels, § 35, p. 181—Holland, Studies, pp. 96–111—Dupuis, Nos. 67 73.

Requisitions and Contributions upon Coast Towns.

§ 212. No case has to my knowledge hitherto occurred in Europe[1] of requisitions or contributions imposed by naval forces upon enemy coast towns. The question whether or not such requisitions and contributions would be lawful became of interest through an article on naval warfare of the future, published in 1882 by the French Admiral Aube in the "Revue des Deux Mondes" (vol. 50, p. 331). Aube pointed out that one of the tasks of the fleet in sea warfare of the future would be to attack and destroy by bombardment fortified and unfortified military and commercial enemy coast towns, or at least to compel them mercilessly to requisitions and contributions. As during the British naval manœuvres of 1888 and 1889 imaginary contributions were imposed upon several coast towns, Hall, § 140*, takes the question into consideration under what conditions requisitions and contributions would be lawful in sea warfare. Hall concludes, after careful consideration,

[1] Holland, Studies, p. 101, mentions a case which occurred in South America in 1871.

that such requisitions and contributions may be levied, provided a force is landed which actually takes possession of the respective coast town and establishes itself there, although only temporarily, until the imposed requisitions and contributions have been complied with ; that, however, no requisitions or contributions could be demanded by a single message sent on shore under threatened penalty of bombardment in case of refusal. There is no doubt that Hall's arguments are logically correct. But whether the practice of sea warfare in future will be in accordance with the rules laid down by Hall is at least doubtful. Hall starts from the principles regarding requisitions and contributions in land warfare, yet it is not at all certain that the naval Powers would consider themselves bound by these principles as regards maritime operations. Be that as it may, the fact is certain that articles 51 and 52 of the Hague Regulations apply to land warfare only.[1]

Bombardment of the Enemy Coast.

§ 213. There is no doubt whatever that enemy coast towns which are defended can be bombarded by naval forces, either acting independently or in co-operation with a besieging army. But the question is whether or not open and undefended coast places can be bombarded by naval forces. The Institute of International Law appointed in 1895 at its meeting at Cambridge a committee to investigate the matter. The report[2] of this committee, drafted by Professor Holland with the approval of the Dutch General Den Beer Portugael, and presented in 1896

[1] The Institute of International Law has touched upon the question of requisitions and contributions in sea warfare in article 4, No. 1, of its rules regarding the bombardment of open towns by naval forces; see below, p. 222. U.S. Naval War Code, article 4, allows "reasonable" requisitions, but no contributions, since "ransom" is not allowed.

[2] See Annuaire, XV. (1896), pp. 148-150.

at the meeting at Venice,[1] is of such interest that I think it advisable to reproduce here in translation the following chief parts of it:—

When the Prince de Joinville recommended in 1844, in case of war, the devastation of the great commercial towns of England, the Duke of Wellington wrote:—"What but the inordinate desire of popularity could have induced a man in his station to write and publish such a production, an invitation and provocation to war, to be carried on in a manner such as has been disclaimed by the civilized portions of mankind?" (Raikes, "Correspondence," p. 367). The opinion of the Prince de Joinville has been taken up by Admiral Aube in an article which appeared in the "Revue des Deux Mondes" in 1882. After having remarked that the ultimate object of war is to inflict the greatest possible damage to the enemy and that "La richesse est le nerf de la guerre," he goes on as follows:—"Tout ce qui frappe l'ennemi dans sa richesse devient non seulement légitime, mais s'impose comme obligatoire. Il faut donc s'attendre à voir les flottes cuirassées, maîtresses de la mer, tourner leur puissance d'attaque et déstruction, à defaut d'adversaires se dérobant à leurs coups, contre toutes les villes du littoral, fortifiées ou non, pacifiques ou guerrières, les incendier, les ruiner, et tout au moins les rançonner sans merci. Cela s'est fait autrefois; cela ne se fait plus; cela se fera encore: Strasbourg et Péronne en sont garants. . . ."

The discussion was opened again in 1888, on the occasion of manœuvres executed by the British Fleet, the enemy part of which feigned to hold to ransom, under the threat of bombardment, great commercial towns, such as Liverpool, and to cause unnecessary devastation to pleasure towns and bathing-places, such as Folkestone, through throwing bombs. One of your reporters observed in a series of letters addressed to the "Times" that such acts are contrary to the rules of International Law as well as to the practice of the present century. He maintained that bombardment of an open town ought to be allowed only for

[1] See Annuaire, XV. (1896), p. 313.

the purpose of obtaining requisitions in kind necessary for the enemy fleet and contributions instead of requisitions, further by the way of reprisals, and in case the town defends itself against occupation by enemy troops approaching on land. . . . Most of the admirals and naval officers of England who took part in the lively correspondence which arose in the "Times" and other journals during the months of August and September 1880 took up a contrary attitude. . . .

On the basis of this report the Institute, at the same meeting, adopted a body of rules regarding the bombardment of open towns by naval forces, declaring that the rules of the law of war concerning bombardment are the same regarding land warfare and sea warfare. Of special interest are articles 4 and 5 of these rules, which run as follows :—

Article 4. In virtue of the general principles above, the bombardment by a naval force of an open town, that is to say one which is not defended by fortifications or by other means of attack or of resistance for immediate defence, or by detached forts situated in proximity, for example of the maximum distance of from four to ten kilomètres, is inadmissible except in the following cases :—

(1) For the purpose of obtaining by requisitions or contributions what is necessary for the fleet. These requisitions or contributions must in every case remain within the limits prescribed by articles 56 and 58 of the Manual of the Institute.

(2) For the purpose of destroying sheds, military erections, depots of war munitions, or of war vessels in a port. Further, an open town which defends itself against the entrance of troops or of disembarked marines can be bombarded for the purpose of protecting the disembarkation of the soldiers and of the marines, if the open town attempts to prevent it, and as an auxiliary measure of war to facilitate the result made by the troops and the disembarked marines, if the town defends itself. Bombardments

of which the object is only to exact a ransom, are specially forbidden, and, with the stronger reason, those which are intended only to bring about the submission of the country by the destruction, for which there is no other motive, of the peaceful inhabitants or of their property.

Article 5. An open town cannot be exposed to a bombardment for the only reasons :—

(1) That it is the capital of the State or the seat of the Government (but naturally these circumstances do not guarantee it in any way against a bombardment).

(2) That it is actually occupied by troops, or that it is ordinarily the garrison of troops of different arms intended to join the army in time of war.

Thus the matter stands as far as the Institute of International Law is concerned. But nobody can say what line of action naval forces will follow in the future regarding bombardment of the enemy coast.[1]

The U.S. Naval War Code now deals with the question in its article 4. The bombardment of undefended unfortified towns is thereby forbidden, except (1) when such bombardment is incidental to the destruction of military and naval establishments and the like, (2) when the reasonable requisitions are not complied with. The bombardment for the non-payment of " ransom " is absolutely forbidden.

[1] Amongst the six " wishes " expressed by the final act of the Hague Peace Conference is the following :—" The Conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent Conference for consideration."

VIII

Interference with Submarine Telegraph Cables

Liszt, § 41, VI.—Bonfils, No. 1278—Pradier-Fodéré, VI. No. 2772—Fiore, III. No. 1387—Perels, § 35, p. 185—Perdrix, "Les câbles sousmarines et leur protection internationale" (1902)—Kraemer, "Die unterseeischen Telegraphenkabel in Kriegszeiten" (1903)—Scholz, "Krieg und Seekabel" (1904)—Holland, in "Journal de Droit International Privé et de la Jurisprudence comparée" (Clunet), XXV. (1898), pp. 648-652—Goffin, in "The Law Quarterly Review," XV. (1899). pp. 145-154—Bar, in the "Archiv für Oeffentliches Recht," XV. (1900), pp. 414-421—Rey, in R.G., VIII. (1901), pp. 681-762—Dupuis, in R.G., X. (1903), pp. 532-547. See also the literature quoted above, vol. I., at the commencement of § 286.

Uncertainty of Rules concerning Interference with Submarine Telegraph Cables.

§ 214. As the "International Convention[1] for the Protection of Submarine Telegraph Cables" of 1884 stipulates expressly by its article 15 that freedom of action is reserved to belligerents, the question is not settled how far belligerents are entitled to interfere with submarine telegraph cables. The Institute of International Law has studied the matter and adopted,[2] at its meeting at Brussels in 1902, the following five rules:—

(1) Le câble sousmarin reliant deux territoires neutres est inviolable.

(2) Le câble reliant les territoires de deux belligérants ou deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans la mer territoriale et dans les eaux neutralisées dépendant d'un territoire neutre.

(3) Le câble reliant un territoire neutre au territoire d'un des belligérants ne peut en aucun cas être coupé dans la mer territoriale ou dans les eaux neutralisées dépendant d'un territoire neutre. En haute mer, ce câble ne peut être coupé que s'il y a blocus effectif et dans les limites de la ligne du blocus, sauf rétablissement du câble dans le plus

[1] See above, vol. I. §§ 286 and 287.

[2] See Annuaire, XIX. (1902), p. 331.

bref délai possible. Le câble peut toujours être coupé sur le territoire et dans la mer territoriale dépendant d'un territoire ennemi jusqu'à d'une distance de trois milles marins de la laisse de basse-marée.

(4) Il est entendu que la liberté de l'État neutre de transmettre des dépêches n'implique pas la faculté d'en user ou d'en permettre l'usage manifestement pour prêter assistance à l'un des belligérants.

(5) En ce qui concerne l'application des règles précédentes, il n'y a de différence à établir ni entre les câbles d'État et les câbles appartenant à des particuliers, ni entre les câbles de propriété ennemie et ceux qui sont de propriété neutre.

The U.S. Naval War Code, article 5, lays down the following rules:—

(1) Submarine telegraphic cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy, are subject to such treatment as the necessities of war may require.

(2) Submarine telegraphic cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy.

(3) Submarine telegraphic cables between two neutral territories shall be held inviolable and free from interruption.[1]

[1] It is impossible for a treatise to discuss the details of the absolutely unsettled question how far belligerents can interfere with submarine telegraph cables. Readers who take a particular interest in it may be referred to the excellent monograph of Scholz, Krieg und Seekabel (1904), which discusses the matter thoroughly and ably.

CHAPTER V

NON-HOSTILE RELATIONS OF BELLIGERENTS

I

On Non-Hostile Relations in General between Belligerents

Grotius, III. c. 19—Pufendorf, VIII. c. 7, §§ 1-2—Bynkershoek, Quaest. jur. publ. I. c. 1—Vattel, III. §§ 174-175—Hall, § 189—Lawrence, § 231—Phillimore, III. § 97—Halleck, I. pp. 310-311—Taylor, § 508—Wheaton, § 399—Bluntschli, § 679—Heffter, § 141—Lueder in Holtzendorff, IV. pp. 525-527—Ullmann, § 157—Bonfils, Nos. 1237-1238—Despagnet, No. 555—Pradier-Fodéré, VII. Nos. 2882-2887—Rivier, II. p. 367—Calvo, IV. §§ 2411-2412—Fiore, III. No. 1482—Martens, II. § 127—Longuet, §§ 134-135—Mérignhac, pp. 218-220—Pillet, pp. 355-356—Kriegsgebrauch, p. 38.

Fides etiam hosti servanda.

§ 215. Although the outbreak of war between States brings regularly all non-hostile intercourse to an end, necessity of circumstances, convenience, humanity, and other factors may call some kinds of non-hostile relations of belligerents into existence. And it is a universally recognised principle of International Law that, where such relations rise, belligerents must carry them out with due faith. *Fides etiam hosti servanda* is a rule which already in antiquity was adhered to when no International Law in the modern sense of the term existed. But it had then a religious and moral sanction only. Since in modern times war is not a condition of anarchy and lawlessness between belligerents, but a contention for many parts regulated, restricted, and modified by

law, it is obvious that, where non-hostile relations between belligerents occur, they are protected by law. *Fides etiam hosti servanda* is, therefore, a principle which nowadays enjoys a legal besides its religious and moral sanction.

Different kinds of Non-hostile Relations.

§ 216. As through the outbreak of war all diplomatic intercourse and all other non-hostile relations come to an end, it is obvious that any non-hostile relations between belligerents must originate from special agreements. These agreements—so-called *commercia belli*—may either be concluded in time of peace for the purpose of creating certain non-hostile relations between the parties in case war breaks out, or they may be concluded during the very time of war. Now such non-hostile relations are created through passports, safe-conducts, safeguards, flags of truce, cartels, capitulations, and armistices. Non-hostile relations may also be created by peace negotiations.[1]

Licences to trade.

§ 217. Several writers[2] speak of non-hostile relations between belligerents created by licences to trade granted by a belligerent to enemy subjects either within certain limits or generally. It has been explained above, in § 101, that it is for Municipal Law to determine whether or not through the outbreak of war all trade and the like is prohibited between the subjects of belligerents. Now, if the Municipal Law of one or both belligerents does contain such a prohibition, it is of course within the discretion of one or both of them to grant exceptional licences to trade to their own or the other belligerent's subjects, and such licences naturally include certain

[1] See below, § 267.

[2] See, for instance, Hall, § 196; Halleck, II. pp. 343–363; Lawrence, § 235; Manning, p. 168; Taylor, § 512; Wheaton, §§ 409–410; Fiore, III. No. 1500; Pradier-Fodéré, VII. No. 2938.

privileges. Thus, for instance, if a belligerent allows enemy subjects to trade with his own subjects, enemy merchantmen engaged in such trade are exempt from capture and appropriation by the grantor. Yet it is not International Law which creates this exemption, but the very licence to trade granted by the belligerent and revocable at any moment; and no non-hostile international relations between the belligerents themselves originate from such licences. The matter would be different if belligerents agreed either in time of peace for the time of war or during time of war upon certain trade to be allowed between their subjects. However, non-hostile relations originating from such an agreement would not be relations arising out of a licence to trade, but out of a cartel.[1]

II

Passports, Safe-conducts, Safeguards

Grotius, III. c. 21, §§ 14–22—Vattel, III. §§ 265–277—Hall, §§ 191 and 195—Lawrence, § 234—Phillimore, III. §§ 98–102—Halleck, II. pp. 323–328—Taylor, § 511—Wheaton, § 408—Bluntschli, §§ 675–678—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 525–527—Ullmann, § 157—Bonfils, Nos. 1246–1247—Despagnet, Nos. 558 and 560—Pradier-Fodéré, VII. Nos. 2884, 2932–2938—Calvo, IV. §§ 2413–2418—Fiore, III. No. 1499—Longuet, §§ 142–143—Mérignhac, pp. 239–240—Pillet, pp. 359–360—Kriegsgebrauch, p. 41—Holland, War, No. 96.

Passports and Safe-conducts.

§ 218. Belligerents on occasions arrange among themselves that passports and safe-conducts shall be given to certain of each other's subjects. Passports are written permissions given by a belligerent to enemy subjects for the purpose of travelling

[1] See below, § 224.

within that belligerent's territory or enemy territory occupied by him. Safe-conducts are written permissions given by a belligerent to enemy subjects for the purpose of going to a particular place for a defined object, for instance, to a besieged town for conducting certain negotiations; but safe-conducts may also be given to goods, and they comprise then the permission for such goods to be carried unmolested to a certain place. Passports as well as safe-conducts make the grantee inviolable as long and in so far as he complies with the conditions specially imposed upon him or actually corresponding with the merits of the special case. Both passports and safe-conducts are not transferable, and may be granted to enemy subjects for a limited and an unlimited period, and in the former case their validity expires with the expiration of the period. Both may be withdrawn, not only when the grantee abuses the protection, but also for military expediency. It must, however, be specially observed that passports and safe-conducts are only a matter of International Law when their grant has been arranged between the belligerents or their responsible commanders. If they are granted without such an arrangement unilaterally on the part of one of the belligerents, they fall outside the scope of International Law.[1]

Safeguards.

§ 219. Belligerents on occasions arrange among themselves that they shall grant protection to certain of each other's subjects or property against their own forces in the form of safeguards, of which there are two kinds. One consists in a written order given to an enemy subject or left with enemy property and

[1] The distinction between passports and the like arranged to be granted between the belligerents, on the one hand, and, on the other, such as are granted unilaterally, would seem to be necessary, although it is generally not made.

addressed to the commander of armed forces of the grantor, in which the former is charged with the protection of the respective individual or property, and by which both become inviolable. The other kind of safeguard is given by detailing one or more soldiers to accompany enemy subjects or to guard the spot where certain enemy property is, for the purpose of protection. Soldiers on this duty are inviolable on the part of the other belligerent; they must neither be attacked nor made prisoners, and they must, on falling into the hands of the enemy, be fed, well kept, and eventually safely sent back to their corps. Just like concerning passports and safe-conduct, it must be specially observed that safeguards are only then a matter of International Law when their granting has been arranged by the belligerents, and not otherwise.

III

Flags of Truce

Hall, § 190—Lawrence, § 232—Phillimore, III. § 115—Halleck, II. pp. 333, 334—Taylor, § 510—Bluntschli, §§ 681-684—Heffter, § 126—Lueder in Holtzendorff, IV. pp. 421-423—Ullmann, § 152—Bonfils, Nos. 1239-1245—Despagnet, No. 556—Pradier-Fodéré, VII. Nos. 2927-2931—Rivier, II. pp. 279-280—Calvo, IV. §§ 2430-2432—Fiore, III. No. 1378—Martens, II. § 127—Longuet, §§ 136-138—Mérignhac, pp. 220-225—Pillet, pp. 356-358—Kriegsgebrauch, pp. 26-29—Holland, War, Nos. 82-85.

Meaning of Flags of Truce.

§ 220. Although the outbreak of war brings all negotiations between belligerents to an end, and although no negotiations are regularly conducted during war, certain circumstances and conditions make it necessary or convenient for the armed forces of belligerents to enter into negotiations with each

other for some purpose or another. Since time immemorial a white flag has been used as a symbol by an armed force who wish to negotiate with the enemy, and always and everywhere it has been considered a duty of the enemy to respect this symbol. In land warfare the flag of truce is made use of in this way,[1] that an individual, charged by his force with the task of negotiating with the enemy, approaches the latter either carrying the flag himself or accompanied by a flag-bearer, and often also accompanied by a drummer or a bugler, or a trumpeter, and an interpreter. In sea warfare the individual charged with the task of negotiating approaches the enemy in a boat flying the white flag. The Hague Regulations have now by their articles 32 to 34 enacted most of the customary rules of International Law regarding flags of truce without adding any new rule. These rules are the same for land warfare as for naval warfare, although their validity for land warfare is now grounded on the Hague Regulations, whereas their validity for naval warfare is still based on custom only.

Treatment of Unadmitted Flag-bearers.

§ 221. As a commander of an armed force is, according to article 33 of the Hague Regulations, not obliged to receive a bearer of a flag of truce, a flag-bearer who makes his appearance may at once be signalled to withdraw. Yet he is inviolable even then from the time he displays the flag to the end of the time necessary for withdrawal. He may during this time neither be intentionally attacked nor made prisoner. However, an armed force in battle is not obliged to stop its military operations on account of the approach of an enemy flag-bearer who has been signalled to withdraw. Although the latter may not

[1] See Hague Regulations, article 32.

intentionally be fired upon, he may during the battle accidentally be killed or wounded without responsibility or moral blame to the belligerent concerned. And it must be specially mentioned that the commander of an armed force may inform the enemy that he will under no circumstances and conditions receive a flag-bearer either within a certain or an indefinite period. Should, in spite of such notice, a flag-bearer approach, he does not enjoy any privilege, and may be attacked and made prisoner like any other member of the enemy forces.

Treatment of Admitted Flag-bearers.

§ 222. Bearers of flags of truce and their party, when admitted by the other side, must be granted the privilege of inviolability. They may neither be attacked nor taken prisoners, and they must be allowed to return in due time and safely within their lines. On the other hand, the forces admitting enemy flag-bearers need not allow them to acquire information about the receiving forces and to carry it back to their own corps. Flag-bearers and their parties may, therefore, be blindfolded by the receiving forces, or be conducted by roundabout ways, or be prevented from entering into communication with other individuals than those who confer officially with them, and they may even temporarily be prevented from returning till a certain military operation is carried out, of which they have obtained information. Article 33 of the Hague Regulations enacts specifically that a commander to whom a flag of truce is sent "can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information." Bearers of flags of truce are, however, not prevented from reporting to their corps any information they have gained by observation in passing the enemy lines and in communicating with enemy individuals. But they

are not allowed to sketch maps of defences and positions, to gather information secretly and surreptitiously, to provoke or to commit treacherous acts, and the like. If they nevertheless do this, they may be court-martialled. Articles 33 and 34 of the Hague Regulations enact specifically that a flag-bearer may temporarily be detained in case he abuses his mission for the purpose of obtaining information, and that he loses all privileges of inviolability "if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery." Bearers of white flags and their party, who approach the enemy and are received, must carry[1] some authorisation with them, which shows that they are charged with the task of entering into negotiations (article 32), otherwise they can be retained as prisoners, since it is his mission and not the white flag itself which protects the flag-bearer. This mission protects everyone who is charged with it, notwithstanding his position in his corps and his status as a civilian or a soldier, but it does not protect a deserter. The latter may be retained, court-martialled, and punished, notice being given to his principal of the reason of punishment.[2]

Abuse of Flag of Truce.

§ 223. The abuse of his mission by an authorised flag-bearer must be distinguished from an abuse of the flag of truce itself. Such abuse is possible in two different forms :—

(1) The force which sends an authorised flag-bearer to the enemy has to take up a corresponding attitude ; the ranks which the flag-bearer leaves being obliged to halt and to cease fire. Now it con-

[1] Article 32 of the Hague Regulations confirms this customary rule by speaking of an individual who is "authorised" by one of the belligerents to enter into communication with the other.

[2] See Hall, § 190.

stitutes an abuse of the flag of truce if such attitude corresponding with the sending of a flag of truce is intentionally not taken up by the sending force. The case is even worse when a flag-bearer is intentionally sent with a feigned mission for the purpose of carrying out military operations on the part of the sender under the protection due on the part of the enemy to the flag-bearer and his party.

(2) The second form of a possible abuse appears in the case in which a white flag is made use of for the purpose of making the enemy believe that a flag of truce is about to be sent, although it is not sent, and of carrying out operations under the protection granted by the enemy to this pretended flag of truce.

It need hardly be specially mentioned that both forms of abuse are gross perfidy and may be met with reprisals, or with punishment of the offenders in case they fall into the hands of the enemy. The following case of abuse is related by Sir Sherston Baker in Halleck (II. p. 315):—"On July 12, 1882, while the British fleet was lying off Alexandria, in support of the authority of the Khedive of Egypt, and the rebels under Arabi Pasha were being driven to great straits, a rebel boat, carrying a white flag of truce, was observed approaching H.M.S. 'Invincible' from the harbour, whereupon H.M. ships 'Temeraire' and 'Inflexible,' which had just commenced firing, were ordered to suspend fire. So soon as the firing ceased, the boat, instead of going to the 'Invincible,' returned to the harbour. A flag of truce was simultaneously hoisted by the rebels on the Ras-el-Tin fort. These deceits gave the rebels time to leave the works and to retire through the town, abandoning the forts, and withdrawing the whole of their garrison under the flag of truce."

IV

Cartels

Grotius, III. c. 21, §§ 23–30—Vattel, III. §§ 278–286—Hall, § 193—Lawrence, §§ 205 and 233—Phillimore, III. §§ 111–112—Halleck, II. pp. 326–329—Taylor, § 599—Bluntschli, §§ 679–680—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 525–527—Ullmann, § 157—Bonfils, Nos. 827 and 1280—Despagnet, Nos. 655—Pradier-Fodéré, VII. Nos. 2832–2837, 2888—Rivier, II. p. 360—Calvo, IV. §§ 2419–2429—Longuet, §§ 140, 141—Pillet, p. 359—Kriegsgebrauch, p. 38—Holland, War, No. 95—Holland, Prize Law, §§ 32–35.

Definition and Purpose of Cartels.

§ 224. Cartels are conventions between belligerents concluded for the purpose of permitting certain kinds of non-hostile intercourse between one another such as would otherwise be prevented through the condition of war. Cartels may be concluded during peace in case of war, or during the time of war, and they may provide for numerous purposes. Thus, communication by post, telegraph, telephone, and railway, which would otherwise not take place, may be arranged by cartels, or the exchange of prisoners, or a certain treatment of wounded, and the like. Thus, further, intercourse between each other's subjects through trade[1] may, either within certain limits or unlimitedly, be agreed upon by belligerents. All rights and duties originating from cartels must be complied with in the same manner and good faith as rights and duties arising from other treaties.

Cartel Ships.

§ 225. Cartel ships[2] are vessels of belligerents which are commissioned for the carriage by sea of exchanged prisoners from the enemy country to their

[1] See above, § 217. But arrangement for granting passports, safe-conducts, and safeguards—see above, §§ 218 and 219—is not a matter of cartels.

[2] See above, § 190.

own country. Custom has sanctioned the following rules regarding these cartel ships for the purpose of securing their protection on the one hand, and, on the other, their exclusive employment as a means for the exchange of prisoners: Cartel ships must not do any trade or carry any cargo or despatches;[1] they are especially not allowed to carry ammunition or instruments of war, except one gun for firing signals. They have to be furnished with a document from an official belonging to the home State of the prisoners and stationed in the country of the enemy declaring that they are commissioned as cartel ships. They are under the protection of both belligerents and may neither be seized nor appropriated. They enjoy this protection not only when actually carrying exchanged prisoners, but also on their way home after such carriage and on their way to fetch prisoners.[2] They lose the protection at once, and may consequently be seized and eventually be appropriated, in case they do not comply, either with the general rules regarding cartel ships, or with the special conditions imposed upon them.

[1] The Rosina, 2 Rob. 372; the Venus, 4 Rob. 355.

[2] The Daifje, 3 Rob. 139; the La Gloire, 5 Rob. 192.

V

Capitulations

Grotius, III. c. 22, § 9—Vattel, III. §§ 261-264—Hall, § 194—Lawrence, § 236—Phillimore, III. §§ 122-127—Halleck, II. pp. 319-322—Taylor, §§ 514-516—Wheaton, § 405—Bluntschli, §§ 697-699—Heffter, § 142—Lueder in Holtzendorff, IV. p. 527—Ullmann, § 157—Bonfils, Nos. 1259-1267—Despagnet, No. 561—Pradier-Fodéré, VII. Nos. 2917-2926—Rivier, II. pp. 361-362—Calvo, IV. §§ 2450-2452—Fiore, III. Nos. 1495-1497—Martens, II. § 127—Longuet, §§ 151-154—Mérignhac, pp. 225-230—Pillet, pp. 361-364—Kriegsgebrauch, pp. 38-41—Holland, War, No. 86.

Character and Purpose of Capitulations.

§ 226. Capitulations are conventions between armed forces of belligerents regarding the surrender of fortresses and other defended places, or of men-of-war, or of a body of troops. Capitulations are military conventions only and exclusively; they must, therefore, not contain arrangements of another than a local military character concerning the surrendering forces, places, or ships. If they nevertheless contain such arrangements, the latter are not valid, except under the condition that they are ratified by the political authorities of both belligerents.[1] The surrender of a certain place or force may, of course, be arranged by some convention containing other than military stipulations, but such surrender would then not originate from a capitulation. And just as is their character, so the purpose of capitulations is merely military—namely, the abandonment of a hopeless struggle and resistance only involving

[1] See Phillimore, III. § 123, who discusses the promise of Lord William Bentinck to Genoa, in 1814, regarding its independence, which was disowned by the British Government. Phillimore himself disapproves of the attitude of Great Britain, and so do some foreign publicists, as, for instance, Despagnet (§ 561); but the rule that capitulations are military conventions, and that, therefore, such stipulations are not valid as are not of a local military character, is indubitable.

useless loss of life on the part of a hopelessly beset force. Therefore, whatever may be the indirect consequences of a certain capitulation, its direct consequences have nothing to do with the war at large, but are local only and concern the surrendering force exclusively.

Contents of Capitulations.

§ 227. If special conditions are not agreed upon in a capitulation, it is concluded under the obvious condition that the surrendering force become prisoners of war and that all war material and other public property in their possession or within the surrendering place or ship are surrendered in the condition they were at the time when the signature was given to the capitulation. Nothing prevents a force fearing surrender from destroying their provisions, munitions, their arms and other instruments of war which, when falling into the hands of the enemy, would be useful to him. Again, nothing prevents a commander, even after negotiations regarding surrender have begun, from destroying such articles. But when once a capitulation has been signed,[1] such destruction is no longer lawful, and, if nevertheless carried out, constitutes a perfidy which may be punished as a war crime by the other party.

But special conditions may be agreed upon between the forces concerned and must then be faithfully adhered to by both parties. The only rule which article 35 of the Hague Regulations enacts regarding capitulations is that the latter must be in accordance

[1] When, during the Russo-Japanese War, in January 1905, General Stoessel, the Commander of Port Arthur, had, during negotiations for surrender, but before the capitulation was signed, fortifications blown up and vessels sunk, the Press undeservedly accused him of perfidy. U.S. Naval War Code, article 52, enacts the right principle, that "*after agreeing upon or signing* a capitulation, the capitulator must neither injure nor destroy the vessels, property, or stores in his possession that he is to deliver up, unless the right to do so is expressly reserved to him in the agreement or capitulation."

with the demands of military honour, and, when once settled, scrupulously observed. It is instructive to give some instances of possible conditions :—A condition of a capitulation may be the provision that the convention shall be valid only, if within a certain period relief troops are not approaching. Provision may, further, be made that the surrendering forces shall not in every detail be treated like ordinary prisoners of war. Thus it may be stipulated that the officers or even the soldiers shall be released on parole, that officers remaining prisoners shall retain their swords. Whether or not a belligerent will grant or even offer such special favourable conditions depends upon the importance of the force, place, or ship to be surrendered, and upon the bravery of the surrendering force. There are even instances of capitulations which stipulated that the surrendering forces should leave the place with full honours, carrying their arms and baggage away and joining their own army unmolested by the enemy through whose lines they have to march.[1]

Form of Capitulations.

§ 228. No rule of International Law exists regarding the form of capitulations, which may, therefore, be concluded either orally or in writing. But they are usually concluded in writing. Negotiations for surrender, from whichever side they emanate, are usually sent under a flag of truce, but a force which is ready to surrender without special conditions can indicate their intention by hoisting a white flag as a signal that they abandon all and every resistance. The question whether the enemy must at once cease firing and accept the surrender, is to be answered

[1] During the Franco-German War the Germans granted these most favourable conditions to the French forces that surrendered Belfort on February 15, 1871.

in the affirmative, provided he is certain that the white flag was hoisted by order or with the authority of the commander of the respective force. As, however, such hoisting may well have taken place without the authority of the commander and may, therefore, be disowned by the latter, no duty exists for the enemy to cease his attack as long as he is not convinced that the white flag really indicates the intention of the commander to surrender.

Competence to conclude Capitulations.

§ 229. The competence to conclude capitulations is vested in the commanders of the forces opposing each other. Capitulations entered into by unauthorised subordinate officers may, therefore, be disowned by the commander concerned without breach of faith. As regards special conditions of capitulations, it must be specially observed that the competence of a commander to grant them is limited[1] to those the fulfilment of which depends entirely upon the forces under his command. If he grants conditions against his instructions, his superiors may disown such conditions. And the same is valid if he grants conditions the fulfilment of which depends upon other forces than his own and upon superior officers. The capitulation in El Arish[2] on January 24, 1800, between the French General Kléber and the Turkish Grand Vizier, and approved by the British Admiral, Sir Sidney Smith, presents an illustrative example of this rule. As General Kléber, who was commanding the French army in Egypt, thought that he could not remain in Egypt, he proposed surrender under the condition that his army should be safely transported to France, carrying away their arms and baggage. The Grand Vizier accepted these conditions. The British Admiral, Sir Sidney Smith, who approved of these

[1] See U.S. Naval War Code, article 51. [2] Martens, R., VII. p. 1.

conditions, was the local commander on the coast of Egypt, but was an inferior officer to Lord Keith, the commander of the British Mediterranean fleet. The latter had, on January 8, 1800, received secret orders, dated December 15, 1799, from the British Government not to agree upon any capitulation stipulating the free return of Kléber's army to France. Sir Sidney Smith did, however, not receive instructions based on these orders before February 22, 1800, and, therefore, when he approved of the capitulation of El Arish in January, was not aware that he acted against orders of the British Government.[1] Lord Keith, after having received the above orders on January 8, 1800, wrote at once to General Kléber, pointing out that he was not allowed to grant the return of the French army to France.[2] On the other hand, the British Government, after having been informed that Sir Sidney Smith had approved of the return of the French army, sent on March 28, 1800, fresh orders[3] to Lord Keith, received by him at the end of April, advising him, although Sir Sidney Smith had exceeded his competence, to allow the capitulation to be carried out and the French army to be safely transported to France. Meanwhile, however, events had taken another turn. When General Kléber had on March 17, 1800, received Lord Keith's letter of January 8, he addressed a proclamation,[4] in which Lord Keith's letter was embodied, to his troops, asked them to prepare themselves for battle, and actually began hostilities again on March 20. He was assassinated on June 14, and General Menou took over the command, and it was the latter who received, on June 20, 1800, informa-

[1] Martens, R., VII. pp. 8 and 9.
[2] Martens, R., VII. p. 10.
[3] Martens, R., VII. p. 11.
[4] Martens, R., VII. p. 15.

tion of the changed attitude of the British Government regarding the capitulation of El Arish. Hostilities having been renewed as far back as March, General Menou refused[1] on his part to consent to the carrying out of the capitulation, and continued hostilities.

It is obvious that Sir Sidney Smith, in approving the capitulation, granted a condition which did not depend entirely upon himself and the forces under himself, but depended upon Lord Keith and his fleet. Lord Keith as well as the British Government could have lawfully disowned this condition. That the British Government did not do so, but was ready to ratify Sir Sidney Smith's approval, was due to the fact that it did not want to disavow Sir Sidney Smith's promises, who was not at the time aware of the orders of his Government to Lord Keith. On the other hand, the French Generals were not wrong in resuming hostilities after having received Lord Keith's first information, as thereby the capitulation fell to the ground.

Violation of Capitulations.

§ 230. That capitulations must be scrupulously adhered to is an old customary rule, now enacted by article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency when ordered by the belligerent Government concerned, and a war-crime when committed without such order. Such violation may be met with reprisals or punishment of the offenders as war-criminals.

[1] Martens, R., VII. p. 16.

VI

Armistices

Grotius, III. c. 21, §§ 1–13, c. 22, § 8—Pufendorf, VIII. c. 7, §§ 3–12—Vattel, III. §§ 233–260—Hall, § 192—Lawrence, § 237—Phillimore, III. §§ 116–121—Halleck, II. pp. 311–319—Taylor, §§ 513 and 516—Wheaton, §§ 400–404—Bluntschli, §§ 688–699—Heffter, § 142—Lueder in Holtzendorff, IV. pp. 531–544—Ullmann, § 158—Bonfils, Nos. 1248–1258—Despagnet, Nos. 562–565—Pradier-Fodéré, VII. Nos. 2889–2918—Rivier, II. pp. 362–368—Calvo, IV. § 2433–2449—Fiore, III. Nos. 1484–1494—Martens, II. § 127—Longuet, §§ 145–149—Mérignhac, pp. 230–239—Pillet, pp. 364–370—Kriegsgebrauch, pp. 41–44—Holland, War, Nos. 87–94.

Character and kinds of Armistices.

§ 231. Armistices or truces, in the wider sense of the term, are all agreements of belligerent forces facing each other for a temporary cessation of hostilities for some purpose or another. They are in no wise to be compared with peace, and ought not to be called a temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals on all points beyond the mere cessation of hostilities. In spite of such cessation the right of visit and search over neutral merchantmen remains, therefore, intact, as does likewise the right to capture neutral vessels attempting to break a blockade, and the right to seize contraband of war. However, although all armistices are essentially alike in so far as they consist in cessation of hostilities, three different kinds must be distinguished—namely, (1) suspensions of arms, (2) general armistices, and (3) partial armistices.[1] It must be

[1] This distinction, although it is, as will be seen from the following sections, absolutely necessary, is not made by several publicists. Holland, War, No. 87, says even: "There is no difference of meaning, according to British usage at least, between a 'truce,' an

emphasised that the Hague Regulations deal with armistices in their articles 36 to 41 on the whole very fragmentarily, so that the gaps need filling up from the old customary rules.

Suspensions of Arms.

§ 232. Suspensions of arms, in contradistinction to armistices in the narrower sense of the term, are such cessations of hostilities as are agreed upon between large or small military or naval forces for a very short time and regarding momentary and local military purposes only. Such purposes may be—collection of the wounded; burial of the dead; negotiation regarding surrender or evacuation of a defended place, or regarding an armistice in the narrower sense of the term; but may also be the creation of a possibility for a commander to ask for and receive instructions from a superior authority,[1] and the like. Suspensions of arms have nothing to do with political purposes, or with the war generally, since they are of momentary and local importance only. They exclusively concern those forces and that spot which are the object of the suspension of arms. The Hague Regulations do not specially mention suspensions of arms at all, since article 37 speaks of local armistices only, apparently comprising suspensions of arms among local armistices.

General Armistices.

§ 233. A general armistice is such a cessation of hostilities as, in contradistinction to suspensions of arms with their momentary and local military purposes, is agreed upon between belligerents for the whole of their forces and the whole region of war. General armistices are always conventions of vital

'armistice,' and a 'suspension of arms.'" See also below, § 233.

[1] An instructive example of suspensions of arms for such purposes is furnished by the Convention between the German forces besieging Belfort and the French forces holding this fortress during the Franco-German War, signed on February 13, 1871; see Martens, N.R.G., XIX. p. 646.

political importance affecting the whole of the war. They are regularly, although not necessarily, concluded for a political purpose, be it that negotiations of peace have ripened so far that the end of the war is in sight and that, therefore, military operations appear superfluous; or be it that the forces of either belligerent are exhausted and need rest; or that the belligerents have to face domestic difficulties, the settlement of which is more pressing than the continuation of the war; or be it another political purpose. Thus article 2 of the general armistice agreed upon at the end of the Franco-German War on January 28, 1871,[1] declared expressly the purpose of the armistice to be the creation of the possibility for the French Government to convoke a Parliamentary Assembly which could determine whether or not the war was to be continued or what conditions of peace should be accepted.

It must be specially observed that, for special reasons, small parts of the belligerent forces and small parts of the theatre of war may be specially excluded without detracting from the general character of the armistice, provided the bulk of the forces and the greater part of the region of war are included. Thus, article 1 of the above-mentioned general armistice at the end of the Franco-German war excluded specially all military operations in the Départements du Doubs, du Jura, de la Côte d'Or, and likewise the siege of Belfort. It should also be mentioned that in the practice of the belligerents the terms "suspension of arms" and "general armistice" are sometimes not sufficiently distinguished, but are interchangeable. Thus, for instance, the above-mentioned general armistice between France and

[1] Martens, N.R.G., XIX. p. 626.

Germany is entitled "Convention entre l'Allemagne et la France pour la suspension des hostilités, . . ." whereas the different articles of the Convention correctly always speak of an armistice, and whereas, further, an annexe to the Convention signed on January 29 is entitled[1] "Annexe à la Convention d'armistice."

Partial Armistices.

§ 234. Partial armistices are agreements upon cessations of hostilities which, on the one hand, are not concluded by belligerents for their whole forces and the whole region of war, and, on the other hand, do not merely serve, like suspensions of arms, momentary and local military purposes. They are armistices concluded by belligerents for a considerable part of their forces and front; they are always of political importance affecting the war in general; and they very often are, although they need not be, agreed upon for political purposes. Article 37 of the Hague Regulations apparently comprises partial armistices together with suspensions of arms under the term "local" armistices. A partial armistice may be concluded for the military or the naval forces only, for cessation of hostilities in the colonies only, for cessation of hostilities between two of the belligerents in case more than two are parties to the war, and the like. But it is always a condition that a considerable part of the forces and the region of war must be included, and that the purpose is not only a momentary one.

Competence to conclude Armistices.

§ 235. As regards the competence to conclude armistices, a distinction is necessary between suspensions of arms and general and partial armistices.

(1) Since the character and purpose of suspensions of arms are military, local, and momentary only,

[1] Martens, N.R.G., XIX. p. 636.

every commander is supposed to be competent to agree upon a suspension of arms, and no ratification on the part of the superior officers or other authorities is required. Even commanders of the smallest opposing detachments can arrange a suspension of arms.

(2) On the other hand, since general armistices are of vital political importance, only the belligerent Governments themselves or their commanders-in-chief are competent to conclude them, and ratification, whether specially stipulated or not, is necessary. Should a commander-in-chief conclude a general armistice which would not find ratification, hostilities can at once be taken up again without breach of faith, it being a matter of common knowledge that a commander-in-chief is not authorised to agree upon exclusion of ratification, unless he received special powers thereto.

(3) Partial armistices may be concluded by the commanders-in-chief of the respective forces, and ratification is not necessary, if not specially stipulated, the commanders being responsible to their own Governments in case they agree upon a partial armistice without being specially authorised thereto.

Form of Armistices.

§ 236. No legal rule exists regarding the form of armistices, which may therefore be concluded either orally or in writing. However, the importance of general as well as partial armistices makes it advisable to conclude them by signing written documents containing all items which have been agreed upon. No instance is known of a general or partial armistice of modern times concluded otherwise than in writing. But suspensions of arms are often orally concluded only.

Contents of Armistices.

§ 237. That all hostilities must cease is the obvious content of all kinds of armistices. Usually,

although not at all necessarily, the parties embody special conditions in the agreement instituting an armistice. If and so far as this has not been done, the import of armistices is for some parts much controverted. Everybody agrees indeed that belligerents during an armistice can, outside the line where the forces face each other, do everything and anything they like regarding defence and preparation of offence; for instance, manufacture and import munitions and guns, drill recruits, build fortresses, concentrate or withdraw troops. But no unanimity exists regarding such acts as must be left undone or may be done within the very line where the belligerent forces face each other. The majority of writers, led by Vattel (III. § 245), maintain that in absence of special stipulations it is essentially implied in an armistice that within such line no alteration of the *status quo* shall take place which the other party, were it not for the armistice, could by application of force, for instance by a cannonade or by some other means, prevent from taking place. These writers consider it a breach of faith for a belligerent to make such alterations under the protection of the armistice. On the other hand, a small minority of writers, but led by Grotius (III. c. 21, § 7) and Pufendorf (VIII. 7, § 7), assert that cessation of hostilities and of further advance only are essentially implied in an armistice, all other acts such as strengthening of positions by concentration of more troops on the spot, erection and strengthening of defences, repairing of breaches of besieged fortresses, withdrawing of troops, making of fresh batteries on the part of besiegers without advancing, and the like, being allowed. As the Hague Regulations do not mention the matter, the controversy still remains unsettled. I believe the

opinion of the minority to be correct, since an armistice does not mean anything else than a cessation of actual hostilities, and it is for the parties agreeing upon an armistice to stipulate such special conditions as they think necessary or convenient. This applies particularly to the likewise controverted questions as to revictualling of besieged places and as to intercourse, commercial and otherwise, of the inhabitants of the region where actual fighting was going on before the armistice. As regards revictualling, it has been correctly maintained that, if it were not allowed, the position of the besieged forces would thereby be weakened during the very time of the armistice. But I cannot see why this should be an argument to hold revictualling permissible. The principle *vigilantibus jura sunt scripta* applies to armistices as well as to all other legal transactions. It is for the parties to prepare such arrangements as really suit their needs and wants. Thus, during the Franco-German War an armistice for twenty-five days proposed in November 1870 fell to the ground on the Germans refusing to grant the revictualling of Paris.[1] It seems to be the intention of the Hague Regulations that the parties should always stipulate those special conditions which they need. Article 39 pronounces this intention regarding intercourse, commercial and other, during armistices with the following words :—" It is for the contracting parties to settle in the terms of the armistice what communications may be held on the theatre of war with the population and with each other."

[1] See Pradier-Fodéré, VI. No. 2908, where the question of revictualling during an armistice is discussed at some length, and the opinions of the different publicists from Grotius to our own days are quoted.

It must be specially mentioned that for the purpose of preventing the outbreak of hostilities during an armistice it is usual to agree upon so-called lines of demarcation[1]—that is, a small neutral zone between the forces facing each other which must not be entered by members of either force. But such lines of demarcation do not exist, if they are not specially stipulated by the armistice concerned.

Commencement of Armistices.

§ 238. In case the contrary is not stipulated, an armistice commences the very moment the agreement upon it is complete. But often the parties stipulate in the agreement the time from which the armistice shall begin. If this is done in so detailed a manner that the very hour of the commencement is mentioned, no cause for controversy is given. But sometimes the parties fix only the date by stipulating that the armistice shall last from one certain day to another, *e.g.* from June 15 to July 15. In such case the actual commencement is controverted. Most publicists maintain that in such case the armistice begins at 12 o'clock of the night from the 14th to the 15th of June, but Grotius (III. c. 21, § 4) maintains that it begins at 12 o'clock of the night from the 15th to the 16th of June.[2] To avoid difficulties, agreements concerning armistices ought, therefore, always to stipulate whether the first day is to be included in the armistice. Be that as it may, when the forces included in an armistice are dispersed over a very large area, the parties very often stipulate different dates of commencement for the different parts of the front, because it is not possible to announce the armistice at once to all the forces included. Thus,

[1] See Pradier-Fodéré, VII. No. 2901.

[2] See Pradier-Fodéré, VII. No. 2897. The controversy turns up again with regard to the end of an armistice; see below, § 240.

for instance, article 1 of the general armistice at the end of the Franco-German War [1] stipulated its immediate commencement for the forces in and around Paris, but that with regard to the other forces its commencement should be delayed three days. Article 38 of the Hague Regulations enacts that an armistice must be notified officially and in good time to the competent authorities and the troops, and that hostilities are suspended immediately after the ratification or at a fixed date, as the case may be.

It happens sometimes that hostilities are carried on after the commencement of an armistice by forces which did not know of its commencement. In such cases the *status quo* at the date of the commencement of armistice has to be re-established as far as possible, prisoners made and enemy vessels seized being liberated, capitulations annulled, places occupied being evacuated, and the like; but the parties may, of course, stipulate the contrary.

Violation of Armistices.

§ 239. Any violation of armistices is prohibited, and constitutes an international delinquency, if ordered by the Governments concerned. In case an armistice is violated by members of the forces on their own account, the individuals concerned may be punished by the other party in case they fall into its hands. Be that as it may, the question must be answered, what general attitude is to be taken by one party, if the other violates the armistice? No unanimity exists regarding this point among the writers on International Law, many [2] asserting that in case of violation the other party can at once,

[1] Martens, N.R.G., XIX. p. 626.

[2] See, for instance, Grotius, III. c. 21, § 11; Pufendorf, VIII. c. 7, § 11; Vattel, III. § 242; Phillimore, II. § 121; Bluntschli, § 695; Fiore, III. No. 1494.

without giving notice, open hostilities again, others[1] maintaining that such party cannot do this, but has the right to denounce the armistice. The Hague Regulations endeavour to settle the controversy, article 40 enacting that any serious violation of an armistice by one of the parties gives the other the right to denounce it, and even, in case of urgency, to recommence hostilities at once. Three rules may be formulated out of this—(1) violations which are not serious do not even give the right to denounce an armistice; (2) serious violations do regularly empower the other party to denounce only the armistice, but not to take up at once hostilities without notice; (3) only in case of urgency is a party justified in recommencing hostilities without notice, when the other party has broken an armistice. But since the term "serious violation" and "urgency" lack a precise definition, it is practically left to the discretion of the injured party.

It must be specially observed that violation of an armistice committed by private individuals acting on their own initiative is to be distinguished from violation by members of the armed forces. In the former case the injured party has, according to article 41 of the Hague Regulations, only the right of demanding punishment of the offenders, and, if necessary, indemnity for the losses sustained.

End of Armistices.

§ 240. In case an armistice has been concluded for an indefinite period, the parties having made no stipulations regarding notice, the latter can be given at any time, and hostilities recommenced at once after notification. In most cases, however, armistices

[1] See, for instance, Calvo, IV. § 2436; Despagnet, No. 565 Pradier-Fodéré, VII. No. 2913.

are agreed upon for a definite period, and then they expire with such period without special notice, if the latter has not been specially stipulated. If, in case of an armistice for a definite period, the exact hour of the termination has not been agreed upon, but only the date, the armistice terminates at 12 o'clock P.M. of such date. In case an armistice has been arranged to last from one certain day to another, *e.g.* from June 15 to July 15, it is again[1] controverted whether July 15 is excluded or included. An armistice may, lastly, be concluded under a resolutive condition, in which case the occurrence of the condition brings the armistice to an end.

[1] See above, § 238

CHAPTER VI

MEANS OF SECURING LEGITIMATE WARFARE

I

On Means in General of securing Legitimate Warfare

Legitimate and Illegitimate Warfare.

§ 241. Since war is not a condition of anarchy and lawlessness, International Law requests that belligerents comply with its rules in carrying on their military and naval operations. As long and in so far as belligerents do this or not, their warfare is legitimate or illegitimate. Now, illegitimate acts and omissions can be committed by belligerent Governments themselves, by the commanders or members of their forces, and by their subjects not belonging to the forces. Experience teaches that on the whole illegitimate acts and omissions of some kind or other committed by single soldiers are unavoidable during war, since the passions which are roused by and during war will always carry away single individuals. But belligerents bear a vicarious responsibility for internationally wrongful acts of their soldiers, which turns into original responsibility when they refuse to repair the wrong done through punishing the offenders and, if necessary, indemnifying the sufferers.[1] The case in which belligerent Governments themselves commit illegitimate acts, as well as the cases in which

[1] See above, vol. I. §§ 149–150.

they refuse punishment for illegitimate acts of their soldiers constitute international delinquencies.[1] Now, if in time of peace an international delinquency is committed, the offended State can, if the worst comes to the worst, make war against the offender to enforce an adequate reparation.[2] But if an international delinquency is committed during warfare itself, no means whatever exist of enforcing a reparation.

How Legitimate Warfare is on the whole secured.

§ 242. Yet practically legitimacy of warfare is, on the whole at least, secured through several means recognised by International Law. These means of securing legitimate warfare may be divided into two classes according to whether they fall under the category of self-help or not. Means belonging to the one class are:—reprisals; punishment of war crimes committed by enemy soldiers and other enemy subjects; the taking of hostages. To the other class belong:—complaints lodged with the enemy; complaints lodged with neutral States; good offices, mediation, and intervention on the part of neutral States. These means do, as I have said, secure the legitimacy of warfare on the whole, because it is in the very interest of either belligerent to prevent the enemy from getting a justified opportunity of making use of them. On the other hand, isolated illegitimate acts of individual enemy soldiers will always occur; but they will in many cases find their punishment either by one party or the other to the war. As regards hostile acts of private enemy individuals not belonging to the armed forces, belligerents have a right[3] to consider and punish them severely as acts of illegitimate warfare.

[1] See above, vol. I. § 151. [2] See above, vol. I. § 156.
[3] See below, § 254.

II

Complaints, Good Offices and Mediation, Intervention

Complaints lodged with the Enemy.

§ 243. Commanders of forces engaged in hostilities frequently lodge complaints with each other regarding single acts of illegitimate warfare committed by members of their forces, such as abuses of the flag of truce, violations of such flag or of the Geneva Convention, and the like. The complaint is sent to the enemy under the protection of a flag of truce, and the interest every commander takes in the legitimate behaviour of his troops will always make him attentive to complaints and punish the offenders, provided the complaints concerned are found to be justified. Very often, however, it is impossible to verify the facts complained of, and then assertion of certain facts by one party and their denial by the other face each other without there being any way of solving the difficulty. It also often happens during war that the belligerent Governments lodge with each other mutual complaints of illegitimate acts and omissions. Since diplomatic intercourse is broken off during war, such complaints are either sent to the enemy under the protection of a flag of truce or through a neutral [1] State which lends its good offices. But here too indignant assertion and emphatic denial frequently face each other without there being a way of solving the conflict.

Complaints lodged with Neutrals.

§ 244. If certain grave illegitimate acts or omissions of warfare occur, belligerents frequently resort

[1] Thus, in October 1904, during the Russo-Japanese War, Japan sent a complaint concerning the alleged use of Chinese clothing on the part of Russian troops to the Russian Government, through the intermediary of the United States of America.

to complaints lodged with neutral States, either asking their good offices, mediation, or intervention to make the enemy comply with the laws of war, or simply drawing their attention to the facts. Thus, at the beginning of the Franco-German War, France lodged a complaint with Great Britain and asked her intervention on account of the intended creation of a volunteer fleet on the part of Germany, which France considered a violation of the Declaration of Paris.[1] Conversely, in January 1871, Germany, in a circular addressed to her diplomatic envoys abroad, and to be communicated to the respective neutral Governments, complained of twenty-one cases in which the French forces had, deliberately and intentionally it was alleged, fired on bearers of a flag of truce.

Good Offices and Mediation.

§ 245. Complaints lodged with neutral States may have the effect that one or more of the latter lend their good offices or their mediation to the belligerents for the purpose of settling such conflict as arose out of the alleged illegitimate acts or omissions of warfare, thus preventing them from resorting to reprisals. Such good offices and mediation would not differ from those which settle a difference between States in time of peace and which have been discussed above in §§ 7–11; they are friendly acts in contradistinction to intervention, which is dictatorial interference for the purpose of making the respective belligerents comply with the laws of war.

Intervention on the part of Neutrals.

§ 246. There can be no doubt that neutral States, whether a complaint has been lodged with them or not, can either singly, or jointly and collectively, exercise intervention in the case of illegitimate acts or omissions of warfare being committed by a belligerent Government, or committed by members of

[1] See above, § 84.

belligerent forces without the Governments concerned punishing the offenders. It will be remembered that it has been stated above in Vol. I. § 135 that other States have a right to intervene in case a State violates in time of peace or war those principles of the Law of Nations which are universally recognised. There is not the slightest doubt that such principles of International Law are endangered in case a belligerent Government commits acts of illegitimate warfare, or does not punish the offenders in case such acts are committed by members of its armed forces. But apart from this, the Hague Regulations let illegitimate acts of warfare on land now appear as an affair which is by right an affair of all signatory States to the Convention, and therefore, in case of war between signatory States, the neutral signatory States certainly would have a right of intervention if acts of warfare were committed which are illegitimate according to the Hague Regulations. It must, however, be specially observed that any such intervention, if it ever occurred, has nothing to do with the war in general and does not make the intervening State a party to the war, but concerns the international delinquency only which was committed by the one belligerent through acts of illegitimate warfare.

III

Reprisals

Vattel, III. p. 142—Hall, § 135—Westlake, Chapters, pp. 253-258—Taylor, §§ 487 and 507—Wharton, III. § 348B—Bluntschli, §§ 567, 580, 654, 685—Lueder in Holtzendorff, IV. p. 392—Bonfils, Nos. 1018-1026—Despagnet, No. 544—Rivier, II. pp. 298-299—Calvo, IV. §§ 2041-2043—Martens, II. § 121—Mérignhac, pp. 210-218—Holland, War, Nos. 99, 100.

Reprisals between Belligerents in contradistinction to Reprisals in time of Peace.

§ 247. Whereas reprisals in time of peace are to be distinguished from retorsion and are injurious acts committed for the purpose of compelling a State to consent to a satisfactory settlement of a difference created through an international delinquency,[1] reprisals between belligerents are retaliation of an illegitimate act of warfare, whether constituting an international delinquency or not, for the purpose of making the enemy in future comply with the rules of legitimate warfare. Reprisals between belligerents are terrible means, because they are in most cases directed against innocent enemy individuals, who must suffer for real or alleged offences for which they are not responsible. But reprisals cannot be dispensed with, because without them illegitimate acts of warfare would be innumerable. As matters stand, every belligerent and every member of his forces knows for certain that reprisals are to be expected in case they violate the rules of legitimate warfare. And when nevertheless an illegal act occurs and is promptly met with reprisals as a retaliation, human nature would not be what it is if such retaliation did not act as a deterrent against a repetition of illegitimate acts.

[1] See above, §§ 33 and 42.

Reprisals admissible for every Illegitimate Act of Warfare.

§ 248. Whereas reprisals in time of peace are admissible for international delinquencies only, reprisals between belligerents are at once admissible for every and any act of illegitimate warfare, whether the act constitutes an international delinquency or not. It is in the consideration of the injured belligerent whether he will at once resort to reprisals, or, before doing so, he will lodge complaints with the enemy or neutral States. Practically, however, a belligerent will rarely resort at once to reprisals, provided the violation of the rules of legitimate warfare is not very grave and the safety of his troops does not at once require drastic measures. Thus, the Germans during the Franco-German War frequently bombarded and fired, by way of reprisals, undefended open villages where their soldiers were treacherously killed by enemy individuals in ambush who did not belong to the armed forces. And Lord Roberts, during the South African War, ordered,[1] by way of reprisals, the destruction of houses and farms in the vicinity of the place where damage was done to the lines of communication.

Danger of Arbitrariness in Reprisals.

§ 249. The right to exercise reprisals carries with it great danger of arbitrariness, for either the alleged facts which make belligerents resort to reprisals are often not sufficiently verified, or the rules of war which they consider violated by the enemy are sometimes not generally recognised, or the act of reprisals performed is often excessive compared with the precedent act of illegitimate warfare. Three cases may illustrate this danger.

(1) In 1782 Joshua Huddy, a captain in the army of the American insurgents, was taken prisoner by

[1] See section 4 of the Proclamation of June 19, 1900 (Martens, N.R.G, 2nd ser., XXXII. p. 147).

loyalists and handed over to a Captain Lippencott for the ostensible purpose of being exchanged, but was arbitrarily hanged. The commander of the British troops had Lippencott arrested, and ordered him to be tried for murder. Lippencott was, however, acquitted by the court-martial, as there was evidence that Lippencott, who commanded the execution of Huddy, acted under orders of a Board which he was bound to obey. Thereupon some British officers who were prisoners of war in the hands of the Americans were directed to cast lots to determine who should be executed by way of reprisals for the execution of Huddy. The lot fell on Captain Asgill, a young officer only nineteen years old, and he would have been executed but for the mediation of the Queen of France, who saved his life.[1]

(2) "The British Government, having sent to England, early in 1813, to be tried for treason, twenty-three Irishmen, naturalised in the United States, who had been captured on vessels of the United States, Congress authorised the President to retaliate. Under this act, General Dearborn placed in close confinement twenty-three prisoners taken at Fort George. General Prevost, under express directions of Lord Bathurst, ordered the close imprisonment of double the number of commissioned and non-commissioned United States officers. This was followed by a threat of 'unmitigated severity against the American citizens and villages' in case the system of retaliation was pursued. Mr. Madison having retorted by putting in confinement a similar number of British officers taken by the United States, General Prevost immediately retorted by subjecting

[1] See the case reported in pp. 311–321. See also Phillimore, Martens, Causes Célèbres, III. III. § 105.

to the same discipline all his prisoners whatsoever. . . . A better temper, however, soon came over the British Government, by whom this system had been instituted. A party of United States officers, who were prisoners of war in England, were released on parole, with instructions to state to the President that the twenty-three prisoners who had been charged with treason in England had not been tried, but remained on the usual basis of prisoners of war. This led to the dismissal on parole of all the officers of both sides." [1]

(3) During the Franco-German War the French had captured forty German merchantmen, and made their captains and crews prisoners of war. Count Bismarck, who considered it against International Law to retain these men as prisoners, demanded their liberation, and when the French refused this, ordered by way of reprisals forty French private individuals of local importance to be arrested and to be sent as prisoners of war to Bremen, where they were kept to the end of the war. Count Bismarck was decidedly wrong,[2] since France had in no way committed an illegal act by retaining the German crews as prisoners of war.[3]

Proposed Restriction of Reprisals.

§ 250. The Hague Regulations do not mention reprisals at all because the Brussels Conference of 1874, which accepted the unratified Brussels Declaration, had struck out several sections of the Russian draft code regarding reprisals. These original sections [4] (69–71) stipulated—(1) that reprisals should

[1] See Wharton, III. § 348B.

[2] That Bismarck's standpoint was wrong has been pointed out above in § 201. Some German writers, however, take his part; see, for instance, Lueder in Holtzendorff, IV. p. 479, note 6.

[3] The case is one of reprisals, and has nothing to do with the taking of hostages; see below, § 258.

[4] See Martens, N.R.G., 2nd ser. IV. pp. 1 139, 207.

be admitted only in extreme cases of absolutely certain violations of the rules of legitimate warfare; (2) that the acts performed by way of reprisals must not be excessive, but in proportion to the respective violation; (3) that reprisals should be ordered by commanders-in-chief only. Articles 85 and 86 of the Manual of the Laws of War, adopted by the Institute of International Law,[1] propose the following rules:— (1) Reprisals are to be prohibited in case reparation is given for the damage done by an illegal act; (2) in grave cases, in which reprisals are an imperative necessity, they must never exceed the degree of the violation committed by the enemy; (3) they can only be resorted to with the authorisation of the commander-in-chief; (4) they must in every case respect the laws of humanity and of morality. In the face of the arbitrariness with which, according to the present state of International Law, reprisals may be exercised, it cannot be denied that an agreement upon some precise rules regarding reprisals is an imperative necessity.

IV

Punishment of War Crimes[2]

Conception of War Crimes.

§ 251. In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as members of armed forces who have done no wrong, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by

[1] See Annuaire, V. p. 174.

[2] Writers on the Law of Nations have hitherto not systematically treated of the question of War Crimes and their punishment. See, however, Hall, § 135; Bluntschli, §§ 627-643A; Holland, War Nos. 97-98; Landa, in R.I., X. (1878), pp. 182-184.

the enemy on capture of the offenders. It must, however, be emphasised that the term war crime is used, not in the moral sense of the term crime, but only in a technical legal sense, on account of the fact that these acts may be met with punishment by the enemy. For, although among the acts called war crimes are many which, such as abuse of a flag of truce or assassination of enemy soldiers for instance, are crimes in the moral sense of the term, there are others which, such as taking part in a levy *en masse* on territory occupied by the enemy for instance, may be highly praiseworthy patriotic acts. Because every belligerent can and actually must in the interest of his own safety punish these acts, they are termed war crimes, whatever may be the motive, the purpose, and the moral character of the respective act.[1]

Different kinds of War Crimes.

§ 252. However, in spite of the uniform qualification of these acts as war crimes, four different kinds of war crimes must be distinguished on account of the essentially different character of the acts. Violations of recognised rules regarding warfare committed by members of the armed forces belong to the first kind; all hostilities in arms committed by individuals who are not members of the enemy armed forces constitute a second kind; espionage and war treason belong to the third; and all marauding acts belong to the fourth kind.

Violations of Rules regarding Warfare.

§ 253. Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy; the latter can, however, resort to reprisals. In case members of

[1] See above, § 57.

forces commit violations ordered by their commanders, the members cannot be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.

The following are the more important violations that may occur:

(1) Making use of poisoned or otherwise forbidden arms and ammunition.

(2) Killing or wounding soldiers disabled by sickness or wounds, or who have laid down arms and surrendered.

(3) Assassination, and hiring of assassins.

(4) Treacherous request for quarter, or treacherous feigning of sickness and wounds.

(5) Ill-treatment of prisoners of war, of the wounded and sick. Appropriation of such of their money and valuables as are not public property.

(6) Killing or attacking harmless private enemy individuals. Unjustified appropriation and destruction of their private property, and especially pillaging.

(7) Disgraceful treatment of dead bodies on the battlefields. Appropriation of such money and other valuables found upon dead bodies as are not public property, nor arms, ammunition, and the like.

(8) Appropriation and destruction of property belonging to museums, hospitals, churches, schools, and the like.

(9) Assault, siege, and bombardment of undefended open towns and other habitations.

(10) Unnecessary bombardment of such hospitals and buildings devoted to religion, art, science, and charity, as are indicated by particular signs notified to the besiegers bombarding a defended town.

(11) Violations of the Geneva Convention.

(12) Attack on or sinking of enemy vessels which have hauled down their flags as a sign of surrender. All attack on enemy merchantmen without previous request to submit to visit.

(13) Attack or seizure of hospital ships, and all other violations of the Hague Convention for the adaptation to naval warfare of the principles of the Geneva Convention.

(14) Unallowed destruction of enemy prizes.[1]

(15) Use of the enemy uniforms and the like during battle, use of the enemy flag during attack by a belligerent vessel.

(16) Violation of enemy individuals furnished with passports or safe-conducts, violation of safeguards.

(17) Violation of bearers of flags of truce.

(18) Abuse of the protection granted to flags of truce.

(19) Violation of cartels, capitulations, and armistices.

(20) Breach of parole.

Hostilities in Arms by Private Individuals.

§ 254. Since International Law is a law between States only and exclusively, no rules of International Law can exist which prohibit private individuals from taking up arms and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileged treatment of members of armed forces, and the enemy has according to a customary rule of International Law the right to consider and punish such individuals as war criminals. Hostilities in arms committed by private individuals are, therefore, war crimes, not because they really are violations of recognised rules regarding warfare, but because the enemy has the right to consider and

[1] Unjustified destruction of neutral prizes—see below, § 431—is not a war crime, but is nevertheless an international delinquency, if ordered by the belligerent government.

punish them as acts of illegitimate warfare. The conflict between praiseworthy patriotism on the part of such individuals and the safety of the enemy troops does not allow of any solution. On the one hand, it would be unreasonable for International Law to impose the duty upon belligerents to forbid on their part the taking up of arms by their private subjects, because it may occasionally be of the greatest value to a belligerent, especially for the purpose of freeing a country from the enemy who has militarily occupied it. On the other hand, the safety of his troops compels the enemy to consider and punish such hostilities as acts of illegitimate warfare, and International Law gives him a right to do so.

It is usual to make a distinction between hostilities in arms on the part of private individuals against an invading or retiring enemy on the one hand, and, on on the other, hostilities in arms committed on the part of the inhabitants against an enemy occupying a conquered territory. In the latter case one speaks of war rebellion, whether inhabitants take up arms singly or rise in a so-called levy *en masse*. Articles 1 and 2 of the Hague Regulations make the greatest possible concessions regarding hostilities committed by irregulars.[1] Beyond the limits of these concessions belligerents will never be able to go without the greatest danger to their troops.

Espionage and War Treason.

§ 255. Article 24 of the Hague Regulations enacts now the old customary rule that a belligerent has a right to employ all the methods necessary to obtain information, and these methods include espionage and treason. But this right stands face to face with the right to consider and punish such enemy individuals, whether soldiers or not, committing acts of espionage

[1] See above, § 80.

or treason, as war criminals. There is an insoluble and inextricable conflict between the necessity of obtaining information on the one hand, and self-preservation on the other; and accordingly espionage and treason, as has been explained above in § 159, bear a twofold character. On the one hand, International Law gives a right to belligerents to make use of espionage and treason. On the other hand, however, the same law gives a right to belligerents to consider espionage and treason within their lines, committed by enemy soldiers or enemy private individuals, as acts of illegitimate warfare, and consequently punishable.

Espionage has already been treated above in §§ 159–161. War treason may be committed in different ways. The following are the chief cases of war treason that may occur:—

(1) Information of any kind given to the enemy.

(2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like, to the enemy.

(3) Any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door to a defended habitation, by repairing a destroyed bridge, or otherwise.

(4) Attempt to induce soldiers to desertion, to surrender, to serve as spies, and the like, and negotiating desertion, surrender, and espionage offered by soldiers.

(5) Attempt to bribe soldiers or officials in the interest of the enemy, and negotiating such bribe.

(6) Liberation of enemy prisoners of war.

(7) Conspiracy against the armed forces or single officers and members of them.

(8) Wrecking of military trains, destruction of the lines of communication or of the telegraphs or telephones in the interest of the enemy, and the destruction of any war material for the same purpose.

(9) Circulation of enemy proclamations dangerous to the interests of the belligerent concerned.

(10) Intentional false guidance of troops, whether the guide was enforced to his task or offered his services voluntarily.

(11) Rendering courier or similar services to the enemy.

It must be specially observed that enemy soldiers —in contradistinction to enemy private individuals —can only be punished for war treason when they have committed the act of treason during their stay within a belligerent's lines under disguise. If, for instance, a party of two soldiers in uniform are sent into the rear of the enemy for the purpose of destroying a bridge, they cannot, when caught by the enemy, be punished for war treason, because they have committed an act of legitimate warfare. But if they change their uniforms for plain clothes and appear thereby to be members of the peaceful private population, they may be punished for war treason. A remarkable case of this kind occurred in the summer of 1904, during the Russo-Japanese War. Two Japanese disguised in Chinese clothes were caught in the attempt to destroy, with the aid of dynamite, a railway bridge in Manchuria, in the rear of the Russian forces. Brought before a court-martial, they confessed themselves to be Ishomo Jokoko, 43 years of age, a Major on the Japanese General Staff, and Jersko Jokki, 31 years of age, a Captain on the Japanese General Staff. They were convicted, and condemned to be hanged, but the punishment was commuted and they were shot. All the newspapers which reported this case reported it as a case of espionage, but it is in fact one of war treason. Although the two officers were in disguise, their

conviction for espionage was impossible according to article 29 of the Hague Regulations, provided, of course, they were court-martialled for no other act than the attempt to destroy a bridge.

Marauding.

§ 256. Marauders are individuals roving either singly or collectively in bands over battlefields, or following in quest of booty forces in advance or retreat. They have nothing to do with warfare in the strict sense of the term, but they are an unavoidable accessory to warfare and frequently consist of soldiers who have left their corps. Their acts are considered acts of illegitimate warfare, and their punishment takes place in the interest of the safety of either belligerent.

Mode of Punishment of War Crimes.

§ 257. All war crimes may be punished with death, but belligerents may, of course, pronounce a more lenient punishment or commute a verdict of death into a more lenient penalty. If this is done and imprisonment takes the place of capital punishment, the question arises whether such convicts must be released at the end of the war, although their term of imprisonment has not yet expired. Some publicists[1] answer this question in the affirmative, maintaining that it could never be lawful to inflict a penalty extending beyond the duration of the war. But I believe that the question has to be answered in the negative. If a belligerent has a right to pronounce capital punishment, it is obvious that he can select a more lenient penalty and carry the latter out even beyond the duration of the war. And it would in no wise be in the interest of humanity to deny this right, for otherwise belligerents would have always to pronounce and carry out capital punishment in the interest of self-preservation.

[1] See, for instance, Hall, § 135, p. 432.

V

Taking of Hostages

Hall, §§ 135 and 156—Taylor, § 525—Bluntschli, § 600—Lueder in Holtzendorff, IV. pp. 475-477—Klüber, §§ 156 and 247—G. F. Martens, II. 277—Ullmann, § 155—Bonfils, Nos. 1145 and 1151—Pradier-Fodéré, VII. Nos. 2843-2848—Rivier, II. p. 302—Calvo, IV. §§ 2158-2160—Fiore, III. Nos. 1363-1364—Martens, II. § 119—Longuet, § 84—Kriegsgebrauch, pp. 49, 50.

Former Practice of taking Hostages.

§ 258. The practice of taking hostages as a means of securing legitimate warfare prevailed in former times much more than nowadays. It was frequently resorted to in all cases, such as capitulations and armistices for instance, in which belligerent forces depended more or less upon each other's faith. To make sure that no perfidy was intended, officers or prominent private individuals were taken as hostages who could be held responsible with their lives for any perfidy committed by the enemy. This practice has totally disappeared, and will hardly be revived. But this former practice must not be confounded with the still continued practice of seizing enemy individuals for the purpose of making them the object of reprisals. Thus, when in 1870, during the Franco-German War, Count Bismarck ordered forty French notables to be seized and to be taken away into captivity as a retaliation upon the French for refusing to liberate the crews of forty captured merchantmen, these forty French notables were not taken as hostages, but were made the object of reprisals.[1]

Modern Practice of taking Hostages.

§ 259. A new practice of taking hostages was resorted to by the Germans in 1870 during the

[1] The case has been discussed above in § 249. All the French writers who comment upon this case, however, make the mistake of enumerating it as an instance of the taking of hostages.

Franco-German War for the purpose of securing the safety of forces against possible hostile acts on the part of private inhabitants of occupied enemy territory. Well-known men of prominence were seized and retained in the expectation that the population would refrain from hostile acts out of regard for the fate of the hostages. Thus, when unknown people frequently wrecked the trains transporting troops, the Germans seized prominent enemy citizens and put them on the engines of trains to prevent the latter from being wrecked, a means which always proved effective and soon put a stop to further train-wrecking. The same practice was resorted to, although for a short time only, by Lord Roberts[1] in 1900 during the South African War. This practice has, apart from a few German writers, been condemned by the publicists of the whole world. But, with all due deference to the authority of so many prominent men, I cannot agree with their opinion. Matters would be different if hostages were seized and exposed to dangers for the purpose of preventing legitimate hostilities on the part of members of the armed forces of the enemy. But nobody can deny that train-wrecking on occupied enemy territory by private enemy individuals is an act which a belligerent is justified in considering and punishing as war treason.[2] It is for the purpose of guarding himself against an act of illegitimate warfare that these hostages are put on the engines. The danger they are exposed to comes from their fellow-citizens, who are informed of the fact that hostages are on the engines

[1] See section 3 of the Proclamation of Lord Roberts; dated Praetoria, June 19, 1900; but this section was repealed by Proclamation of July 29, 1900. See Martens, N.R.G., 2nd ser., XXXII. (1905), pp. 147 and 149.

[2] See above, § 255, No. 8.

and ought therefore to refrain from wrecking the trains. It cannot and will not be denied that the measure is a hard one, and makes individuals liable to suffer for acts for which they are not responsible. But the safety of his troops and lines of communication is at stake for the belligerent concerned, and I doubt, therefore, whether even the most humane commanders will be able to dispense with this measure, since it alone has proved effective. And it must further be taken into consideration that the amount of cruelty contained in it is in no wise greater than in reprisals where also innocent individuals must suffer for illegitimate acts for which they are not responsible. And is it not more reasonable to prevent train-wrecking by putting hostages on the engines than to resort to reprisals for wreckage of trains? For there is no doubt that a belligerent is justified in resorting to reprisals [1] in each case of train-wrecking by private enemy individuals.[2]

[1] See above, § 248.

[2] Belligerents sometimes take hostages to secure compliance with requisitions, contributions, ransom bills, and the like, but such cases have nothing to do with illegitimate warfare; see above, p. 122, note 1, and p. 176, note 3. The Hague Regulations, do not at all mention the taking of hostages for any purpose.

CHAPTER VII

END OF WAR, AND POSTLIMINIUM

I

On Termination of War in General

Hall, § 197—Lawrence, § 238—Phillimore, III. § 510—Taylor, § 580—Heffter, § 176—Kirchenheim in Holtzendorff, IV. pp. 791–792—Ullmann, § 169—Bonfils, No. 1692—Despagnet, No. 603—Calvo, V. § 3115—Fiore, III. No. 1693—Martens, II. § 128—Longuet, § 155.

War a Temporary Condition.

§ 260. The normal condition between two States being peace, war can never be more than a temporary condition; whatever may have been the cause or causes of a war, the latter can naturally not last for ever. For either the purpose of war will be realised and one belligerent will be overpowered by the other, or both will sooner or later be so exhausted by their exertions that they will desist from continuing the struggle. But nevertheless wars may last for many years, although of late European wars have become shorter and shorter. The shortening of European wars in recent times is the result of several factors, the more important of which are:—the conscription on which are based the armies of all the great European Powers, Great Britain excepted; the net of railways extending over all European countries, which enables a much quicker transport of troops on enemy territory; lastly, the vast numbers of the opposing forces which usually hasten the decisive battle.

§ 261. Be that as it may, a war may be terminated in three different ways. Belligerents may, first, abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty. Or, secondly, belligerents may formally establish the condition of peace between each other through a special treaty of peace. Or, thirdly, a belligerent may end the war through subjugation of his adversary.[1]

Three Modes of Termination of War.

II

Simple Cessation of Hostilities

Hall, § 203—Phillimore, III. § 511—Halleck, II. p. 468—Taylor, § 584—Bluntschli, § 700—Heffter, § 177—Kirchenheim in Holtzendorff, IV. p. 793—Ullmann, § 169—Bonfils, No. 1693—Despagnet, No. 603—Rivier, II. pp. 435-436—Calvo, V. § 3116—Fiore, III. No. 1693—Martens, II. § 128—Longuet, § 155—Mérignhac, p. 323—Pillet, p. 370.

§ 262. The regular modes of termination of war are treaties of peace or subjugation, but cases have occurred in which simple cessation of all acts of war on the part of both belligerents has actually and informally brought the war to an end. Thus ended in 1716 the war between Sweden and Poland, in 1720 the war between Spain and France, in 1801 the war between Russia and Persia, in 1867 the war between France and Mexico. And it may also be mentioned that, whereas the war between Prussia and several

Exceptional Occurrence of simple Cessation of Hostilities.

[1] That a civil war may come to an end through simple cessation of hostilities or through a treaty of peace need hardly be mentioned. But it is of importance to state the fact that there is a difference between civil war and other war concerning the third mode of ending war, namely, subjugation. For to terminate a civil war, conquest *and* annexation, which together make subjugation, is unnecessary (see below, § 264), but conquest alone is sufficient.

German States in 1866 came to an end through subjugation of some States and through treaties of peace with others, Prussia has never concluded a treaty of peace with the Principality of Lichtenstein, which was also a party to the war. Although such termination of war through simple cessation of hostilities is for many reasons inconvenient, and is, therefore, regularly avoided, it may nevertheless in the future as in the past occasionally occur.

Effect of Termination of War through simple Cessation of Hostilities.

§ 263. Since in the case of termination of war through simple cessation of hostilities no treaty of peace embodies the conditions of peace between the former belligerents, the question arises whether the *status* which existed between the parties before the outbreak of war, the *status quo ante bellum*, should be revived, or the *status* which exists between the parties at the time when they simply ceased hostilities, the *status quo post bellum* (the *uti possidetis*), can be upheld. The majority of publicists[1] correctly maintain that the *status* which exists at the time of cessation of hostilities becomes silently recognised through such cessation, and is, therefore, the basis of the future relations of the parties. This question is of the greatest importance regarding enemy territory militarily occupied by a belligerent at the time hostilities cease. According to the correct opinion such territory can be annexed by the occupier, the adversary through the cessation of hostilities having dropped all rights he possessed over such territory. On the other hand, this termination of war through cessation of hostilities contains no decision regarding such claims of the parties as have not been settled by the actual position of affairs at the termination of

[1] See, however, Phillimore, III. § 511, who maintains that the *status quo ante bellum* has to be revived.

hostilities, and it remains with the parties to settle them by special agreement or to let them stand over.

III

Subjugation

Vattel, III. §§ 199-203—Hall, §§ 204-205—Lawrence, § 98—Phillimore, III. § 512—Halleck, I. pp. 467-498—Taylor, §§ 220, 585-588—Walker, § 11—Wheaton, § 165—Bluntschli, §§ 287-289, 701-702—Heffter, § 178—Kirchenheim in Holtzendorff, IV. p. 792—Liszt, § 10—Ullmann, §§ 81 and 169—Bonfils, Nos. 535 and 1694—Despagnet, Nos. 395-398, 603—Rivier, II. pp. 436-441—Calvo, V. §§ 3117-3118—Fiore, II. Nos. 863, III. No. 1693—Martens, I. § 91, II. § 128—Longuet, § 155—Mérignhac, p. 324—Pillet, p. 371—Holtzendorff, "Eroberung und Eroberungsrecht" (1871)—Heimburger, "Der Erwerb der Gebietshoheit" (1888), pp. 121-132—Westlake, in "The Law Quarterly Review," XVII. (1901), p. 392.

Subjugation in contradistinction to Conquest.

§ 264. Subjugation must not be confounded with conquest, although there can be no subjugation without conquest. Conquest is taking possession of enemy territory through military force. Conquest is completed as soon as the territory concerned is effectively[1] occupied. Now it is obvious that conquest of a part of enemy territory has nothing to do with subjugation, because the enemy may well reconquer it. But even the conquest of the whole of the enemy territory need not necessarily include subjugation. For, first, in a war between more than two belligerents the troops of one of them may evacuate their country and join the army of allies, so that the armed contention is continued, although the territory of one of the allies is completely conquered.

[1] The conditions of effective occupation have been discussed above in § 167. Regarding subjugation as a mode of acquisition of territory, see above, vol. I. §§ 236-241.

Again, a belligerent, although he has annihilated the forces, conquered the whole of the territory of his adversary, and thereby has actually brought the armed contention to an end,[1] may not nevertheless exterminate the enemy State by annexing the conquered territory, but may conclude a treaty of peace with the expelled or imprisoned head of the defeated State, re-establish the latter's Government, and hand the whole or a part of the conquered territory over to it. Subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory. Subjugation may, therefore, correctly be defined as *extermination in war of one belligerent by another through annexation*[2] *of the former's territory after conquest, the enemy forces having been annihilated.*[3]

Subjugation a formal End of War.

§ 265. Although complete conquest, together with annihilation of the enemy forces, brings the armed contention, and thereby the war, actually to an end, the formal end of the war is thereby not yet realised, as everything depends upon the resolution of the victor regarding the fate of the vanquished State. If he be willing to re-establish the captive or expelled head of the vanquished State, it is a treaty of peace concluded with the latter which terminates the war. But if he desires to acquire the whole of the conquered territory for himself, he annexes it, and

[1] The continuation of guerilla war after the termination of a real war is a fact which has been discussed above in § 60.

[2] That conquest alone is sufficient for the termination of civil wars has been pointed out above in p. 275, note 1.

[3] It should be mentioned that a premature annexation may become valid through the occupation in question becoming soon afterwards effective. Thus, although the annexation of the South African Republic, on September 1, 1900, was premature, it became valid through the occupation becoming effective in 1901. See above, p. 172, note 1.

thereby formally ends the war through subjugation. That the expelled head of the vanquished State protests and keeps up his claims, matters as little as eventual protests on the part of neutral States. These protests may be of political importance for the future, legally they are of no importance at all.

History presents numerous instances of subjugation. Although nowadays no longer so frequent as in former times, subjugation is not at all of rare occurrence. Thus, modern Italy came into existence through the subjugation by Sardinia in 1859 of the Two Sicilies, the Grand Dukedom of Tuscany, the Dukedoms of Parma and Modena, and in 1870 the Papal States. Thus, further, Prussia subjugated in 1866 the Kingdom of Hanover, the Dukedom of Nassau, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Main. And Great Britain annexed in 1900 the Orange Free State and the South African Republic.[1]

[1] Since Great Britain annexed these territories in 1900, the agreement of 1902, regarding "Terms of Surrender of the Boer Forces in the Field"—see Parliamentary Papers, South Africa, 1902, Cd. 1096—is not a treaty of peace, and the South African War came formally to an end through subjugation, although—see above, p. 172, note 1—the proclamation of the annexation was somewhat premature. The agreement embodying the terms of surrender of the routed remnants of the Boer forces has, therefore, no internationally legal basis (see also below, p. 287, note 1). The case would be different if the British Government had really—as Sir Thomas Barclay asserts in The Law Quarterly Review, XXI. (1905), pp. 303 and 307—recognised the existence of the Government of the South African Republic down to May 31, 1902.

IV

Treaty of Peace

Grotius, III. c. 20—Vattel, IV. §§ 9-18—Phillimore, III. §§ 513-516—Halleck, I. pp. 306-324—Taylor, §§ 590-592—Wheaton, §§ 538-543—Bluntschli, §§ 703-707—Heffter, § 179—Kirchenheim in Holtzendorff, IV. pp. 794-804—Ullmann, § 170—Bonfils, Nos. 1696-1697, 1703-1705—Despagnet, Nos. 604-609—Rivier, II. pp. 443-453—Calvo, V. §§ 3119-3136—Fiore, III. Nos. 1694-1700—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 324-329—Pillet, pp. 372-375.

Treaty of Peace the most frequent End of War.

§ 266. Although occasionally war ends through simple cessation of hostilities, and although subjugation is not at all rare and irregular, the most frequent end of wars is a treaty of peace. Many publicists correctly call a treaty of peace the normal mode of terminating war. On the one hand, simple cessation of hostilities is certainly an irregular mode. Subjugation, on the other hand, is in most cases either not within the scope of the intention of the victor or not realisable. And it is quite reasonable that a treaty of peace should be the normal end of wars. States which are driven from disagreement to war will, sooner or later, when the fortune of war has given its decision, be convinced that the armed contention ought to be terminated. Thus a mutual understanding and agreement upon certain terms is the normal mode of ending the contention. And it is a treaty of peace which embodies such understanding.

Peace Negotiations.

§ 267. However, as the outbreak of war interrupts all regular non-hostile intercourse between the belligerents, negotiations of peace can often be initiated under difficulties only. Each party, although

willing to negotiate, may have strong reasons for not opening negotiations. Good offices and mediation on the part of neutrals have, therefore, always been of great importance, as thereby negotiations were called into existence which otherwise would have been long delayed. But it must be emphasised that formal as well as informal peace negotiations do in no wise *ipso facto* bring hostilities to a standstill, although a partial or general armistice may be concluded for the purpose of such negotiations. The fact that peace negotiations are going on directly between belligerents does not create any non-hostile relations between them other than those negotiations themselves. Such negotiations may take place through the exchange of letters between the belligerent Governments, or through special negotiators who may meet on neutral territory or on the territory of one of the belligerents. In case they meet on belligerent territory, the enemy negotiators are inviolable and must be treated on the same footing as bearers of flags of truce, if not as diplomatic envoys. For it may happen that a belligerent receives an enemy diplomatic envoy for the purpose of peace negotiations. Be that as it may, negotiations, wherever taking place and by whomever conducted, may always be broken off before an agreement is arrived at.

Preliminaries of Peace.

§ 268. Although they are ready to terminate the war through a treaty of peace, belligerents are frequently for some reason or another not able to settle all the terms of peace at once. In such cases hostilities are usually brought to an end through so-called preliminaries of peace, the definite treaty, which has to take the place of the preliminaries, to be concluded later on. Such preliminaries are a treaty in themselves, embodying an agreement of the parties regarding

such terms of peace as are essential. Preliminaries are as binding as any other treaty, and therefore they need ratification to be binding. Very often, but not necessarily, the definitive treaty of peace is concluded elsewhere. Thus, the war between Austria, France, and Sardinia was ended by the Preliminaries of Villafranca of July 11, 1859, yet the definitive treaty of peace was concluded at Zurich on November 10, 1859. The war between Austria and Prussia was ended by the Preliminaries of Nickolsburg of July 26, 1866, yet the definitive treaty of peace was concluded at Prague on August 23. In the Franco-German War the Preliminaries of Versailles of February 26, 1871, were the precursor of the definitive treaty of peace concluded at Frankfort on May 10, 1871.[1]

The purpose for which preliminaries of peace are agreed upon makes it obvious that such essential terms of peace as are stipulated by the Preliminaries are the basis of the definitive treaty of peace. It may happen, however, that neutral States protest for the purpose of preventing this. Thus, when the war between Russia and Turkey had been ended through the Preliminaries of San Stefano of March 3, 1878, Great Britain protested, a Congress met at Berlin, and Russia had to be content with less favourable terms of peace than those stipulated at San Stefano.

Form and Parts of Peace Treaties.

§ 269. International Law does not contain any rules regarding the form of peace treaties; they may, therefore, be concluded verbally or in writing. But the importance of the matter makes the parties always conclude a treaty of peace in writing, and

[1] No preliminaries of peace were agreed upon at the end of the Russo-Japanese war. After negotiations at Portsmouth (New Hampshire) led to a final understanding on August 29, 1905, the treaty of peace was signed on September 5, and ratified on October 16.

there is no instance of a verbally concluded treaty of peace.

According to the different points stipulated, it is usual to distinguish different parts within a peace treaty. Besides the preamble, there are general, special, and separate articles. General articles are those which stipulate such points as are to be agreed upon in every treaty of peace, as the date of termination of hostilities, the release of prisoners of war, and the like. Special articles are those which stipulate the special terms of the agreement of peace in question. Separate articles are those which stipulate points with regard to the execution of the general and special articles, or which contain reservations and other special remarks of the parties. Sometimes *additional* articles occur. Such are stipulations agreed upon in a special treaty following the treaty of peace and comprising stipulations regarding such points as have not been mentioned in the treaty of peace.

Competence to conclude Peace.

§ 270. As the treaty-making Power is according to the Law of Nations in the hands of the head [1] of the State, it is he who possesses competence of concluding peace. But just as in constitutional restrictions imposed upon heads of States regarding their general power of concluding treaties,[2] so constitutional restrictions imposed upon heads of States regarding their competence of making peace are of importance for International Law. And, therefore, such treaties of peace concluded by heads of States as violate constitutional restrictions are not binding upon the States concerned, because the heads have exceeded their powers. The Constitutions of the different States settle the matter differently, and it is not at all necessary that the power of declaring war

[1] See above, vol. I. § 495.

[2] See above, vol. I. § 497.

and that of making peace are vested by a Constitution in the same hands. In Great Britain the power of the Crown to declare war and to make peace is indeed unrestricted. But in the German Empire, for instance, it is different; for whereas the Emperor, the case of an attack on German territory excepted, can declare war with the consent of the Bundesrath only, his power of making peace is unrestricted.[1]

The controverted question whether the head of a State who is a prisoner of war is competent to make peace ought to be answered in the negative. The reason is that the head of a constitutional State, although he does not by becoming prisoner of war lose his position, nevertheless thereby loses the power of exercising the rights connected with his position.[2]

Date of Peace.

§ 271. Unless the treaty provides otherwise, peace commences with the signature of the peace treaty. Should the latter not be ratified, hostilities may be recommenced, and the unratified peace treaty is considered as an armistice. Sometimes, however, the peace treaty fixes a future date for the commencement of peace, stipulating that hostilities must cease on a certain future day. This is the case when war is waged in different or distant parts of the world, so that it is impossible at once to inform the opposing forces of the conclusion of peace.[3] It may even occur that different dates are stipulated for the termination of hostilities in different parts of the world.

The question has arisen whether, in case a peace treaty provides a future date for the termination of hostilities in distant parts, and in case the forces in

[1] See more examples in Rivier, II. p. 445.

[2] See Vattel, IV. § 13.

[3] The ending of the Russo-Japanese war was quite peculiar. Although the treaty of peace was signed on September 5, 1905, the agreement concerning an armistice pending ratification of the peace treaty was not signed until September 14, and hostilities went on till September 16.

these parts hear of the conclusion of peace before such date, they must abstain at once from further hostilities. Most publicists correctly answer this question in the affirmative. But the French Prize Courts in 1801 condemned the English vessel "Swineherd" as a good prize which was captured by the French privateer "Bellona" in the Indian Seas within the period of five months fixed by the Peace of Amiens for the termination of hostilities in these seas.[1]

V

Effects of Treaty of Peace

Grotius, III. c. 20—Vattel, IV. §§ 19-23—Hall, §§ 198-202—Lawrence, § 239—Phillimore, III. §§ 518-528—Halleck, I. pp. 312-324—Taylor, §§ 581-583—Wheaton, §§ 544-547—Bluntschli, §§ 708-723—Heffter, §§ 180-183, 184A—Kirchenheim in Holtzendorff, IV. pp. 804-817—Ullmann, § 171—Bonfils, Nos. 1698-1702—Despagnet, No. 605—Rivier, II. pp. 454-461—Calvo, V. §§ 3137-3163—Fiore, III. Nos. 1701-1703—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 330-336—Pillet, pp. 375-377.

Restoration of Condition of Peace.

§ 272. The chief and general effect of a peace treaty is restoration of the condition of peace between the former belligerents. As soon as the treaty is ratified, all rights and duties which exist in time of peace between the members of the family of nations are *ipso facto* and at once revived between the former belligerents.

On the one hand, all acts legitimate in warfare cease to be legitimate. Neither contributions and requisitions, nor attacks on members of the armed forces and on fortresses, nor capture of ships, nor

[1] The details of this case are given by Hall, § 199; see also Phillimore, III. § 521.

occupation of territory are any longer lawful. If forces, in ignorance of the conclusion of peace, commit such hostile acts, the condition of things at the time peace was concluded must as far as possible be restored.[1] Thus, ships captured must be set free, territory occupied must be evacuated, members of armed forces taken prisoners must be liberated, contributions imposed and paid must be repaid.

On the other hand, all peaceful intercourse of the former belligerents as well as of their subjects takes place again as before the war. Thus diplomatic intercourse is reinstated, consular officers recommence activity.[2]

It must be specially observed that the condition of peace created by a peace treaty is legally final in so far as the order of things set up and stipulated by the treaty of peace is now the settled basis of the future relations between the parties, however contentious the matters concerned may have been before the outbreak of war. In concluding peace the parties expressly or implicitly declare that regarding such settled matters they have come to an understanding. They may indeed make war against each other in future on other grounds, but they are legally bound not to go to war for such matters as have been settled by a previous treaty of peace. That the practice of States does sometimes not comply with this rule is a well-known fact which, although it discredits this rule, cannot shake its theoretical validity.

[1] The Mentor, 1 Rob. 175. Matters are, of course, different in case a future date—see above, § 271—is stipulated for the termination of hostilities.

[2] The assertion of many writers, that such contracts between subjects of belligerents as have been suspended by the outbreak of war revive *ipso facto* by the conclusion of peace is not the outcome of a rule of International Law. But just as Municipal Law may suspend such contracts *ipso facto* by the outbreak of war, so it may revive them *ipso facto* by the conclusion of peace (see above, § 101).

§ 273. Unless the parties stipulate otherwise, the effect of a treaty of peace is that everything remains in such condition as it was at the time peace was concluded. Thus, all moveable State property, as munitions, provisions, arms, money, horses, means of transport, and the like, seized by an invading belligerent remain his property, as likewise do the fruits of immoveable property seized by him. Thus, further, if nothing is stipulated regarding conquered territory, it remains in the hands of the possessor, who can annex it. But it is nowadays usual, although not at all legally necessary, for the conqueror desirous of retaining conquered territory to stipulate cession of such territory in the treaty of peace.

Principle of *Uti Possidetis.*

§ 274. Since a treaty of peace is considered a final settlement of the war, one of the effects of every peace treaty is the so-called amnesty—that is, an immunity for all wrongful acts done by the belligerents themselves, the members of their forces, and their subjects during the war, and due to political motives. It is usual, but not at all necessary, to insert an amnesty clause in treaties of peace.[1] All so-called war crimes which have not been punished before the conclusion of peace can now no longer be punished. Individuals who have committed such war crimes and are arrested for them must be liberated.[2] International delinquen-

Amnesty.

[1] See above, §§ 251–257. Clause 4 of the "Terms of Surrender of the Boer Forces in the Field"—see Parliamentary Papers, South Africa, 1902, Cd. 1096—seems to contradict this assertion, as it expressly excludes from the amnesty "certain acts, contrary to usages of war, which have been notified by the Commander - in - Chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities. But it will be remembered—see above, p. 279, note 1—that the agreement embodying these terms of surrender does not bear the character of a treaty of peace, the Boer War having been terminated through subjugation.

[2] This applies to such individuals only as have not yet been convicted. Those who are undergoing a term of imprisonment

cies committed intentionally by belligerents through violation of the rules of legitimate warfare are considered condoned. Even claims for reparation of damages caused by such acts cannot be raised after the conclusion of peace, unless the contrary is expressly stipulated. On the other hand, the amnesty has nothing to do with ordinary crimes and with debts incurred during war. A prisoner of war who commits a murder during captivity may be tried and punished after conclusion of peace, just as a prisoner who runs into debt during captivity may be sued after the conclusion of peace, or an action may be brought on ransom bills after peace has been restored.

But it must be specially observed that the amnesty grants immunity only for wrongful acts done by the subjects of one belligerent against the other. Such wrongful acts as have been committed by the subjects of a belligerent against their own Government are not covered by the amnesty. Therefore treason, desertion, and the like committed during the war by his own subjects may be punished by a belligerent after the conclusion of peace, unless the contrary has been expressly stipulated in the treaty of peace.[1]

Release of Prisoners of War.

§ 275. A very important effect of a treaty of peace is termination of the captivity of prisoners of war.[2] This does, however, not mean that with the conclusion of peace all prisoners of war must at once be released from their place of detention. It only means—to use the words of article 20 of the Hague Regulations—that "After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as

need not be liberated at the conclusion of peace; see above, § 257.

[1] Thus Russia stipulated by article 17 of the Preliminaries of San Stefano, in 1878—see Martens, N.R.G., 2nd ser. III. p. 252—that Turkey must accord an amnesty to such of her subjects as had compromised themselves during the war.

[2] See above, § 132.

possible." The instant release of prisoners on the spot would not only be inconvenient for the State which kept them in captivity, but also for themselves, as in most cases they possess no means to pay for their journey home. Therefore, although they cease with the conclusion of peace to be in captivity, prisoners of war remain as a body under military discipline until they are brought to the frontier and handed over to their Government. That prisoners of war may be retained after conclusion of peace until they have paid debts incurred during captivity seems to be a pretty generally[1] recognised rule. But it is controverted whether such prisoners of war may be retained as are undergoing a term of imprisonment imposed upon them for disciplinary offences. After the Franco-German War in 1871 Germany retained such prisoners,[2] whereas Japan after the Russo-Japanese War in 1905 released them.

Revival of Treaties.

§ 276. The question how far a peace treaty has the effect of reviving treaties concluded between the parties before the outbreak of war is much controverted. The answer depends upon the decision of the other question, how far the outbreak of war cancels existing treaties between belligerents.[3] There can be no doubt that all such treaties as have been cancelled by the outbreak of war do not revive. On the other hand, there can likewise be no doubt that such treaties revive as have only become suspended by the outbreak of war. But no certainty or unanimity exists regarding such treaties as do not belong to the above two classes, and it must, therefore, be emphasised that no rule of International Law exists concerning

[1] See, however, Pradier-Fodéré, VII. No. 2839, who objects to it.

[2] See Pradier-Fodéré, VII. No. 2840.

[3] See the very detailed discussion of the question in Phillimore, III. §§ 529–538; see also above, § 99.

these treaties. It is for the parties to make special stipulations in the peace treaty which settle the matter.

VI

Performance of Treaty of Peace

Grotius, III. c. 20—Vattel, IV. §§ 24-34—Phillimore, III. § 597—Halleck, I. pp. 322-324—Taylor, §§ 593-594—Wheaton, §§ 548-550—Bluntschli, §§ 724-726—Heffter, § 184—Kirchenheim in Holtzendorff, IV. pp. 817-822—Ullmann, § 171—Bonfils, Nos. 1706-1709—Despagnet, Nos. 610, 611—Rivier, II. pp. 459-461—Calvo, V. §§ 3164-3168—Fiore, III. Nos. 1704-1705—Martens, II. § 128—Longuet, §§ 156-164—Mérignhac, pp. 336-337.

Treaty of Peace how to be carried out.

§ 277. The general rule, that treaties must be performed in good faith, applies to peace treaties as well as to others. The great importance, however, of a treaty of peace and its particular circumstances and conditions involves the necessity of drawing attention to some points connected with the performance of treaties of peace. Occupied territory may have to be evacuated, a war indemnity to be paid in cash, boundary lines of ceded territory may have to be drawn, and many other tasks to be performed. These tasks often necessitate the conclusion of numerous treaties for the purpose of performing the peace treaty concerned, and the appointment of commissioners who meet in conferences to inquire into details and prepare a compromise. Difficulties may arise in regard to the interpretation [1] of certain stipulations of the peace treaty which arbitration will settle if the parties cannot agree. Arrangements will have to be made for the case in which a part or the whole of the territory occupied during the war remains

[1] See above, vol. I. §§ 553-554.

according to the peace treaty for some period under military occupation, such occupation to serve as a means of securing the performance of the peace treaty.[1] One can form an idea of the numerous points of importance to be dealt with during the performance of a treaty of peace if one takes the fact into consideration that after the Franco-German War was terminated in 1871 by the Peace of Frankfort, more than a hundred Conventions were successively concluded between the parties for the purpose of carrying out this treaty of peace.

Breach of Treaty of Peace.

§ 278. Just as the performance, so the breach of peace treaties is of great importance. A peace treaty may be violated in its whole extent or in one of its stipulations only. Violation by one of the parties does not *ipso facto* cancel the treaty, but the other party can cancel it on the ground of violation. Just as in violation of treaties in general, so in violations of treaties of peace, some publicists maintain that a distinction must be drawn between essential and non-essential stipulations, and that violation of essential stipulations only creates a right of cancelling the treaty of peace. It has been shown above, vol. I. § 547, that the majority of publicists rightly oppose such distinction.

But a distinction must be made between violation during the period in which the conditions of the peace treaty have to be fulfilled and violation after such period. In the first case, the other party can at once recommence hostilities, the war being considered not to have terminated at all through the violated peace treaty. The second case, which might happen soon or several years after the period for the fulfilment of the peace conditions, is in no way

[1] See above, vol. I. § 527.

different from violation of any treaty in general. And if a party cancels the peace treaty and wages war for its violation against the offender, this war is a new war, and in no way a continuation of the previous war terminated by the now violated treaty of peace. It must, however, be specially observed that, just as in case of violation of a treaty in general, so in case of violation of a peace treaty, the offended party who wants to cancel the treaty on the ground of its violation must do this in due time after the violation has taken place, otherwise the treaty remains valid, or at least the non-violated parts of it. A mere protest does neither constitute a cancellation nor reserve the right of cancellation.[1]

VII

Postliminium

Grotius, III. c. 9—Bynkershoek, Quaest. jur. publ. I. c. 15 and 16—Vattel, III. §§ 204-222—Hall, § 162-166—Manning, pp. 190-195—Phillimore, III. §§ 568-590—Halleck, II. pp. 500-526—Taylor, § 595—Wheaton, § 398—Bluntschli, §§ 727-741—Heffter, §§ 188-192—Kirchenheim in Holtzendorff, IV. pp. 822-836—Ullmann, § 169—Bonfils, No. 1710—Despagnet, No. 612—Rivier, II. pp. 314-316—Calvo, V. §§ 3169-3226—Fiore, III. Nos. 1706-1712—Martens, II. § 128—Pillet, p. 377.

Conception of Postliminium.

§ 279. The term "postliminium" is originally one of Roman Law derived from *post* and *limes* (*i.e.* boundary). According to Roman Law the relations of Rome with a foreign State depended upon the fact whether or not a treaty of friendship[2] existed. If such a treaty was not in existence, Roman individuals coming into the foreign State concerned could be enslaved, and Roman goods coming there

[1] See above, vol. I. § 547.

[2] See above, vol. I. § 40.

could be appropriated. Now, *jus postliminii* denoted the rule, first, that such an enslaved Roman, should he ever return into the territory of the Roman Empire, became *ipso facto* a Roman citizen again with all the rights he possessed previous to his capture, and, second, that Roman property, appropriated after entry into the territory of a foreign State, should at once revert to its former Roman owner *ipso facto* by coming back into the territory of the Roman Empire. Modern International and Municipal Law have adopted the term for the purpose of indicating the fact that territory, individuals, and property, after having come in time of war under the sway of the enemy, return either during the war or with the end of the war under the sway of their original Sovereign. This can occur in different ways. A territory occupied can voluntarily be evacuated by the enemy and then at once be re-occupied by the owner. Or it can be re-conquered by the legitimate Sovereign. Or it can be reconquered by a third party and restored to its legitimate owner. Conquered territory can also be freed through a successful levy *en masse*. Property seized by the enemy may be retaken, but it may also be abandoned by the enemy and subsequently revert to the belligerent from whom it was taken. And, further, conquered territory may in consequence of a treaty of peace be restored to its legitimate Sovereign. In all cases concerned, the question has to be answered what legal effects the postliminium has in regard to the territory, the individuals thereon, or the property concerned.

Postliminium according to International

§ 280. Most writers confound the effects of postliminium according to Municipal Law with those according to International Law. For instance:

Law, in contradistinction to Postliminium according to Municipal Law.

whether a recaptured private ship falls *ipso facto* back into the property of its former owner,[1] whether the former laws of a reconquered State revive *ipso facto* by the reconquest, whether sentences passed on criminals during the time of an occupation by the enemy should be annulled—these and most of the other questions treated in books on International Law have nothing to do with International Law at all, but have to be answered by the Municipal Law of the respective States exclusively. International Law can be concerned only with such effects of postliminium as are international. These international effects of postliminium may be grouped under the following heads: revival of the former condition of things, validity of legitimate acts, invalidity of illegitimate acts.

Revival of the Former Condition of Things.

§ 281. Although a territory and the individuals thereon come through military occupation in war under the actual sway of the enemy, neither such territory nor such individuals fall, according to the rules of International Law of our times, under the sovereignty of the invader. They rather remain, if not acquired by the conqueror through subjugation, under the sovereignty of the other belligerent, although the latter is in fact prevented from exercising his supremacy over them. Now, the moment the invader voluntarily evacuates such territory, or is driven away through a levy *en masse*, or by troops of the other belligerent or of his ally, the former condition of things *ipso facto* revives, the territory and individuals concerned being at once, as far as International Law is concerned, considered to be again under the sway of their legitimate Sovereign. For all events of international importance taking

[1] See above, § 196.

place on such territory the legitimate Sovereign is again responsible towards third States, whereas during the time of occupation the occupant was responsible for such events.

But it must be specially observed that the case in which the occupant of a territory is driven out of it by the forces of a third State not allied with the legitimate Sovereign of such territory is not a case of postliminium, and that consequently the former state of things does not revive, unless the new occupant hands the territory over to the legitimate Sovereign. If this is not done, the military occupation of the new occupant takes the place of that of the previous occupant.

Validity of Legitimate Acts.

§ 282. Postliminium has no effect upon such acts of the former military occupant connected with the occupied territory and the individuals and property thereon as were legitimate acts of warfare. On the contrary, the State into whose possession such territory has returned must recognise all such legitimate acts of the former occupant, and the latter has by International Law a right to demand such recognition. Therefore, if the occupant has collected the ordinary taxes, has sold the ordinary fruits of immoveable property, has disposed of such moveable State property as he was competent to appropriate, or has performed other acts in conformity with the laws of war, this cannot be ignored by the legitimate Sovereign after he has again taken possession of the territory.

However, only those consequences of such acts must be recognised which have occurred during the occupation. A case which illustrates this happened after the Franco-German War. In October 1870, during occupation of the *Départements de la Meuse*

and *de la Meurthe* by the German troops, a Berlin firm entered into contract with the German Government for felling 15,000 oak trees from the State forests of these *départements*, paying in advance 2,250*l.* The Berlin firm sold the contract rights to others, who felled 9,000 trees and sold in March 1871 their right to fell the remaining 6,000 trees to a third party. The latter felled a part of these trees during the German occupation, but, when the French Government again took possession of the territory concerned, the contractors were without indemnity prevented from further felling of trees.[1] The question whether the Germans had a right at all to enter into the contract is doubtful. But even if they had such right, it covered the felling of trees during their occupation only, and not afterwards.

Invalidity of Illegitimate Acts.

§ 283. If the occupant has performed acts which are not legitimate acts of warfare, postliminium makes their invalidity apparent. Therefore, if the occupant has sold immoveable State property, such property may afterwards be claimed from the acquirer, whoever he is, without any indemnity. If he has given office to individuals, the latter may afterwards be dismissed. If he has appropriated and sold such private or public property as cannot legitimately be appropriated by a military occupant, it may afterwards be claimed from the acquirer without payment of damages.

No Postliminium after Interregnum.

§ 284. Cases of postliminium occur only when a conquered territory comes either during or at the end of the war again into the possession of the legitimate

[1] The Protocol of Signature added to the Additional Convention to the Peace Treaty of Frankfort, signed on December 11, 1871 —see Martens, N.R.G., XX. p. 868 —comprises a declaration stating the fact that the French Government does not recognise any liability to pay indemnities to the contractors concerned.

Sovereign. No case of postliminium arises when a territory ceded to the enemy by the treaty of peace or conquered and annexed without cession at the end of a war terminated through simple cessation of hostilities[1] later on returns into the possession of its former owner State, or when the whole of the territory of a State which was conquered and subjugated regains its liberty and becomes again the territory of an independent State. Such territory has actually been under the sovereignty of the conqueror; the period between the conquest and the revival of the previous condition of things was not one of mere military occupation during war, but one of interregnum during time of peace, and therefore the revival of the former condition of things is not a case of postliminium. An illustrative instance of this is furnished by the case of the domains of the Electorate of Hesse-Cassel.[2] This hitherto independent State was subjugated in 1806 by Napoleon and became in 1807 part of the Kingdom of Westphalia constituted by Napoleon for his brother Jerome, who governed it up to the end of 1813, when with the downfall of Napoleon the Kingdom of Westphalia fell to pieces and the former Elector of Hesse-Cassel was reinstated. Jerome had during his reign sold many of the domains of Hesse-Cassel. The returned Elector, however, did not recognise these contracts, but deprived the owners of their property without indemnification, maintaining that a case of postliminium had arisen, and that Jerome had no right to sell the domains. The Courts of the Electorate pronounced against the Elector, denying that a case of postliminium had arisen, since Jerome, although

[1] See above, § 263.

[2] See Phillimore, III. §§ 568–574, and the literature there quoted.



a usurper, had been King of Westphalia during an interregnum, and since the sale of the domains was therefore no wrongful act. But the Elector, who was absolute in the Electorate, did not comply with the verdict of his own courts, and the Vienna Congress, which was approached in the matter by the unfortunate proprietors of the domains, refused its intervention, although Prussia strongly took their part. It is generally recognised by all writers on International Law that this case was not one of postliminium, and the attitude of the Elector cannot be defended by recourse to International Law.

PART III

NEUTRALITY

CHAPTER I

ON NEUTRALITY IN GENERAL

I

Development of the Institution of Neutrality

Hall, §§ 208-214—Lawrence, § 244—Phillimore, III. §§ 161-226—Twiss, II. §§ 208-212—Taylor, §§ 596-613—Walker, History, pp. 195-203, and Science, pp. 374-385—Geffcken in Holtzendorff, IV. pp. 614-634—Ullmann, § 192—Bonfils, Nos. 1494-1521—Rivier, II. pp. 370-375—Calvo, IV. §§ 2494-2591—Fiore, III. Nos. 1503-1535—Martens, II. § 130—Dupuis, Nos. 302-307—Mérignhac, pp. 339-342—Boeck, Nos. 8-153—Kleen, I. pp. 1-70—Cauchy, "Le droit maritime international" (1862), vol. II. pp. 325-430—Gessner, pp. 1-69—Bergbohm, "Die bewaffnete Neutralität 1780-1783" (1884)—Fauchille, "La diplomatie française et la ligue des neutres 1780" (1893)—Schweizer, "Geschichte der schweizerischen Neutralitaet" (1895), I. pp. 10-72.

Neutrality not practised in Ancient Times.

§ 285. Since in antiquity there was no notion of an International Law,[1] it is not to be expected that neutrality as a legal institution should have existed among the nations of old. But neutrality did not exist even in practice, for belligerents never recognised an attitude of impartiality on the part of other States. If war broke out between two nations, third parties had to choose between the belligerents and become ally or enemy of one or other. This does not mean that third parties had actually to take part in the fighting. Nothing of the kind was the case. But they had, if necessary, to render assistance; for

[1] See above, Vol. I. § 37.

example, to allow the passage of belligerent forces through their country, to supply provisions and the like, on the one hand, and, on the other, to deny all such assistance to the enemy. Several instances are known of efforts[1] on the part of third parties to take up an attitude of impartiality, but belligerents never recognised such impartiality.

Neutrality during the Middle Ages.

§ 286. During the Middle Ages matters changed in so far only as in the latter part of this period belligerents did not exactly force third parties to a choice, but legal duties and rights connected with neutrality did not exist. A State could maintain that it was no party to a war, although it furnished one of the belligerents with money, troops, and other kinds of assistance. To avoid such assistance, which was in no way considered illegal, treaties were frequently concluded during the latter part of the Middle Ages for the purpose of specially stipulating that the parties should be obliged not to assist in any way each other's enemies during time of war, and to prevent their subjects from doing the same. It is through the influence of such treaties that the difference during war between a real and feigned impartial attitude of third States grew up, and that neutrality, as an institution of International Law, gradually developed during the sixteenth century.

Of great importance was the fact that the Swiss Confederation, in contradistinction to her policy during former times, made it from the end of the sixteenth century a matter of policy always to remain neutral during wars of other States. Although this former Swiss neutrality can in no way be compared with modern neutrality, since Swiss mercenaries were for centuries to come fighting in all

[1] See Geffcken in Holtzendorff, IV. pp. 614-615.

European wars, the Swiss Government itself succeeded in constantly taking up and preserving such an attitude of impartiality as complied with the current rules of neutrality.

It should be mentioned that the collection of rules and customs regarding Maritime Law which goes under the name of *Consolato del Mare* made its appearance at about the middle of the fourteenth century. The rule there laid down, that in time of war enemy goods on neutral vessels may be seized, but that, on the other hand, neutral goods on enemy vessels must be restored, became of great importance, since Great Britain acted accordingly from the beginning of the eighteenth century until the outbreak of the Crimean War in 1854.[1]

Neutrality during the Seventeenth Century.

§ 287. At the time of Grotius, neutrality was recognised as an institution of International Law, although such institution was in its infancy only and wanted a long time to reach its present range. Grotius did not know, or at least did not make use of, the term neutrality. He treats neutrality in the very small seventeenth chapter of the Third Book on the Law of War and Peace under the head *De his, qui in bello medii sunt*, and establishes in § 3 two doubtful rules only. The first is that neutrals shall do nothing which may strengthen such belligerent whose cause is unjust, or which may hinder the movements of such belligerent whose cause is just. The second rule is that in a war in which it is doubtful whose cause is just neutrals shall treat both belligerents alike in permitting the passage of troops as well as in supplying provisions for the troops, and in not rendering assistance to persons besieged.

The treatment of neutrality by Grotius shows, on

[1] See above, § 176.

the one hand, that apart from the recognition of the fact that third parties could remain neutral, not many rules regarding the duties of neutrals existed, and, on the other hand, that the granting of passage to troops of belligerents and the supply of provisions to them was not considered illegal. And the practice of the seventeenth century furnishes numerous instances of the fact that neutrality did not really mean an attitude of impartiality, and that belligerents did not respect the territories of neutral States. Thus, although Charles I. remained neutral, the Marquis of Hamilton and six thousand British soldiers were fighting in 1631 under Gustavus Adolphus. "In 1626 the English captured a French ship in Dutch waters. In 1631 the Spaniards attacked the Dutch in a Danish port; in 1639 the Dutch were in turn the aggressors, and attacked the Spanish Fleet in English waters; again, in 1666 they captured English vessels in the Elbe . . . ; in 1665 an English fleet endeavoured to seize the Dutch East India Squadron in the harbour of Bergen, but were beaten off with the help of the forts; finally, in 1693, the French attempted to cut some Dutch ships out of Lisbon, and on being prevented by the guns of the place from carrying them off, burnt them in the river."[1]

Progress of Neutrality during the Eighteenth Century.

§ 288. It was not until the eighteenth century that theory and practice agreed upon the duty of neutrals to remain impartial, and the duty of belligerents to respect the territories of neutrals. Bynkershoek and Vattel formulate adequate conceptions of neutrality. Bynkershoek[2] does not use the term "neutrality," but calls neutrals *non hostes*, and he describes them as those who are of neither party—*qui neutrarum partium sunt*—in a war, and who do

[1] See Hall, § 209, p. 604. [2] Quaest. jur. publ. I. c. 9.

not, according to a treaty, give assistance to either party. Vattel (III. § 103), on the other hand, makes use of the term "neutrality," and gives the following definition:—"Neutral nations, during a war, are those who take no one's part, remaining friends common to both parties, and not favouring the armies of one of them to the prejudice of the other." But although Vattel's book appeared in 1758, twenty-one years after that of Bynkershoek, his doctrines are in some ways less advanced than those of Bynkershoek. The latter, in contradistinction to Grotius, maintained that neutrals have nothing to do with the question which party to a war had a just cause, that neutrals, being friends to both parties, have not to sit as judges between these parties, and, consequently, must not give or deny to one or other party more or less in accordance with their conviction as to the justice or injustice of the cause of each. Vattel, however, teaches (III. § 135) that a neutral, although he may generally allow the passage of troops of the belligerents through his territory, can refuse this passage to such belligerent as is making war for an unjust cause.

Although the theory and practice of the eighteenth century agreed upon the duty of neutrals to remain impartial, the impartiality demanded was not at all a strict one. For, first, throughout the greatest part of the century a State was considered not to violate neutrality in case it furnished one of the belligerents with such limited assistance as it had previously promised by treaty.[1] In this way troops could be supplied to a belligerent by a neutral, and passage through neutral territory could be granted to his forces. And, secondly, the possibility existed for

[1] See examples in Hall, § 211.

either belligerent to make use of the resources of neutrals. It was not considered a breach of neutrality on the part of a State to allow one or both belligerents levies of troops on its territory, or the granting of Letters of Marque to vessels belonging to its commercial fleet. During the second half of the eighteenth century, theory and practice became indeed aware of the fact that neutrality was not consistent with all these and other indulgences. But this only led to the distinction between neutrality in the strict sense of the term and an imperfect neutrality.

As regards respect of neutral territory on the part of belligerents, progress was also made in the eighteenth century. Whenever neutral territory was violated, reparation was asked and made. But it was considered lawful for the victor to pursue the vanquished army into neutral territory, and, likewise, for a fleet to pursue the beaten enemy fleet into neutral territorial waters.

First Armed Neutrality.

§ 289. Whereas, on the whole, the duty of neutrals to remain impartial and the duty of belligerents to respect neutral territory became generally recognised during the eighteenth century, the members of the Family of Nations did not come during this period to an agreement regarding the treatment of neutral vessels trading with belligerents. It is true that the right of visit and search for contraband of war and the right to seize the latter was generally recognised, but in all other respects no general theory and practice was agreed upon. France and Spain upheld the rule that neutral goods on enemy ships as well as neutral ships carrying enemy goods could be seized by belligerents. Although England granted from time to time, by special treaties with special States, the rule "Free ship, free goods," her general

practice throughout the eighteenth century followed the rule of the *Consolato del Mare*, according to which enemy goods on neutral vessels can be seized, whereas neutral goods on enemy vessels must be restored. England, further, upheld the principle that the commerce of neutrals should in time of war be restricted within the same limits as in time of peace, since most States reserved in time of peace cabotage and trade with their colonies to vessels of their own merchant marine. It was in 1756 that this principle first came into dispute. In this year, during war with England, France found that on account of the naval superiority of England she was unable to carry on her colonial trade by her own merchant marine, and she threw, therefore, this trade open to vessels of the Netherlands, which had remained neutral. England, however, ordered her fleet to seize all such vessels with their cargoes on the ground that they had become incorporated into the French merchant marine, and had thereby acquired enemy character. From this time the above principle is commonly called the "rule[1] of 1756." England, thirdly, followed other Powers in the practice of declaring enemy coasts to be blockaded and condemning captured neutral vessels for breach of blockade, although the blockades were not at all always effective.

As privateering was legitimate and in general use, neutral commerce was considerably disturbed during every war between naval States. Now in 1780, during war between Great Britain, her American Colonies, France, and Spain, Russia sent a circular[2] to England, France, and Spain, in which she

[1] See Phillimore, III. §§ 212-222; Hall, § 234; Manning, pp. 260-267; Boeck, No. 52; Dupuis, Nos. 131-133.

[2] Martens, R., III. p. 158.

proclaimed the following five principles: (1) That neutral vessels should be allowed to navigate from port to port of belligerents and along their coasts; (2) that enemy goods on neutral vessels, contraband excepted, should not be seized by belligerents; (3) that, with regard to contraband, articles 10 and 11 of the treaty of 1766 between Russia and Great Britain should be applied in all cases; (4) that a port should only be considered blockaded if the blockading belligerent had stationed vessels there, so as to create an obvious danger for neutral vessels entering the port; (5) that these principles should be applied in the proceedings and judgments on the legality of prizes. In July and August 1780, Russia[1] entered into a treaty, first with Denmark and then with Sweden, for the purpose of enforcing those principles by equipping a number of men-of-war. Thus the "Armed Neutrality" made its appearance. In 1781, the Netherlands, Prussia, and Austria, in 1782 Portugal, and in 1783 the Two Sicilies joined the league. France, Spain, and the United States of America accepted the principles of the league without formally joining. The war between England, the United States, France, and Spain was terminated in 1783, and the war between England and the Netherlands in 1784, but in the treaties of peace the principles of the "Armed Neutrality" were not mentioned. This league had no direct practical consequences, since England retained her former standpoint. Moreover, some of the States that had joined the league acted against its principles when they themselves went to war—as did Sweden in 1788 during war with Russia, and France and Russia in 1793—and some of them concluded treaties in which

[1] Martens, R., III. pp. 189 and 198.

were contained stipulations at variance with those principles. Nevertheless, the First Armed Neutrality has proved of great importance, because its principles have furnished the basis of the Declaration of Paris of 1856.

The French Revolution and the Second Armed Neutrality.

§ 290. The wars of the French Revolution showed that the time was not yet ripe for the progress aimed at by the First Armed Neutrality. Russia, the very same Power which had initiated the Armed Neutrality in 1780 under the Empress Catharine II. (1762–1796), joined with Great Britain in 1793 to interdict all neutral navigation into ports of France, with the intention of subduing France by famine. Russia and England justified their attitude by the exceptional character of their war against France, which had proved the enemy of the security of all other nations. The French Convention answered with an order to the French fleet to capture all neutral ships carrying provisions to enemy ports or carrying enemy goods.

But although Russia herself had acted in defiance of the principles of the First Armed Neutrality, she called a second into existence in 1800, during the reign of the Emperor Paul. The Second Armed Neutrality was caused by the refusal of England to concede immunity from visit and search to neutral merchantmen under convoy.[1] Sweden was the first to claim in 1653, during war between Holland and Great Britain, that the belligerents should not visit and search Swedish merchantmen under convoy of Swedish men-of-war, provided a declaration was made by the men-of-war that the merchantmen had no contraband on board. Other States by-and-by raised the same claim, and many treaties were

[1] See below, § 417.

concluded which stipulated immunity from visit and search of neutral merchantmen under convoy. But Great Britain refused to recognise the principle, and when, in July 1800, a British squadron captured a Danish man-of-war and her convoy of several merchantmen for having resisted visit and search, Russia invited Sweden, Denmark, and Prussia to renew the "Armed Neutrality," and to add to its principles the further one, that belligerents should not have a right of visit and search in case the commanding officer of the man-of-war, under whose convoy neutral merchantmen are sailing, should declare that the convoyed vessels do not carry contraband of war. In December 1800 Russia concluded treaties with Sweden, Denmark, and Prussia consecutively, by which the "Second Armed Neutrality" became a fact.[1] But it lasted only a year through the assassination of the Emperor Paul of Russia on March 23, and the defeat of the Danish fleet by Nelson on April 2, 1801, in the battle of Copenhagen. Nevertheless, the Second Armed Neutrality proved likewise of importance, for it led to a compromise in the "Maritime Convention" concluded by England and Russia under the Emperor Alexander I. on June 17, 1801, at St. Petersburg.[2] By article 3 of this treaty, England recognised, as far as Russia is concerned, the rules that neutral vessels may navigate from port to port and on the coasts of belligerents, and that blockades must be effective. But in the same article 3 England enforced recognition by Russia of the rule that enemy goods on neutral vessels may be seized, and she did not recognise the immunity of neutral vessels under convoy from visit

[1] Martens, R., VII. pp. 127–171. IV. pp. 218–302. See also Martens, Causes Célèbres,

[2] Martens, R., VII. p. 260.

and search, although, by article 4, she conceded that the right of visit and search should be exercised only by men-of-war, and not by privateers, in case the neutral vessels concerned sail under convoy.

But this compromise did not last long. When in November 1807 war broke out between Russia and England, the former annulled in her declaration of war[1] the Maritime Convention of 1801, proclaimed again the principles of the First Armed Neutrality, and asserted that she would never drop these principles again. Great Britain proclaimed in her counter-declaration[2] her return to those principles against which the First and the Second Armed Neutrality were directed, and she was able to point out that no other Power had applied these principles more severely than Russia under the Empress Catharine II. after the latter had initiated the First Armed Neutrality.

Thus all progress made by the Maritime Convention of 1801 fell to the ground. Times were not favourable to any progress. After Napoleon's Berlin decrees in 1806 ordering the boycott of all English goods, England declared all French ports and all the ports of the allies of France blockaded, and ordered her fleet to capture all ships destined to these ports. And Russia, which had in her declaration of war against England in 1807 solemnly asserted that she would never again drop the principles of the First Armed Neutrality, by article 2 of the Ukase[3] published on August 1, 1809, violated one of the most important of these principles in ordering that neutral vessels carrying enemy (English) goods were to be stopped and the enemy goods seized, and the

[1] Martens, R., VIII. p. 706.
[2] Martens, R., VIII. p. 710.
[3] Martens, N.R., I. p. 484.

vessels themselves seized if more than the half of their cargoes consisted of enemy goods.

Neutrality during the Nineteenth Century.

§ 291. The development of the rules of neutrality during the nineteenth century is caused by four factors.

(1) The most prominent and influential factor is the attitude of the United States of America towards neutrality from 1793 to 1818. When in 1793 England joined the war which had broken out in 1792 between the so-called First Coalition and France, Genêt, the French diplomatic envoy accredited to the United States, granted Letters of Marque to American merchantmen manned by American citizens in American ports. These privateers were destined to cruise against English vessels, and French Prize Courts were set up by the French Minister in connection with French consulates in American ports. On the complaint of Great Britain, the Government of the United States ordered these privateers to be disarmed and the French Prize Courts to be disorganised.[1] As the trial of Gideon Henfield,[2] who was acquitted, proved that the Municipal Law of the United States did not prohibit the enlistment of American citizens in the service of a foreign belligerent, Congress in 1794 passed an Act forbidding temporarily American citizens to accept Letters of Marque from a foreign belligerent and to enlist in the army or navy of a foreign State, and forbidding the fitting out and arming of vessels intended as privateers for foreign belligerents. Other Acts were passed from time to time. Finally, on April 20, 1818, Congress passed the Foreign Enlistment Act, which deals definitely with the

[1] See Wharton, III. §§ 395–396.
[2] Concerning this trial, see Taylor, § 609.

matter, and is still in force,[1] and afforded the basis of the British Foreign Enlistment Act of 1819. The example of the United States initiated the present practice, according to which it is the duty of neutrals to prevent the fitting out and arming on their territory of cruisers for belligerents, to prevent enlistment on their territory for belligerents, and the like.

(2) Of great importance for the development of neutrality during the nineteenth century became the permanent neutralisation of Switzerland and Belgium. These States naturally adopted and retained throughout every war an exemplary attitude of impartiality towards either belligerent. And each time when war broke out in their vicinity they took effectual military measures for the purpose of preventing belligerents from making use of their neutral territory and resources.

(3) The third factor is the Declaration of Paris of 1856, which incorporated into International Law the rule "Free ship, free goods," the rule that neutral goods on enemy ships cannot be appropriated, and the rule that blockade must be effective.

(4) The fourth and last factor is the general development of the military and naval resources of all members of the Family of Nations. As every big State was, during the second half of the nineteenth century, always obliged to keep its army and navy at every moment ready for war, in consequence, whenever war broke out, each belligerent was always anxious not to hurt neutral States in order to avoid their taking the part of the enemy. On the other hand, neutral States were always anxious to fulfil the

[1] See Wheaton, §§ 434–437; Taylor, § 610; Lawrence, § 244.

duties of neutrality for fear of being dragged into the war. Thus the general rule, that the development of International Law has been fostered by the interests of the members of the Family of Nations, applies also to the special case of neutrality. But for the interest of belligerents to remain during the war on good terms with neutrals, and but for the interest of the neutrals not to be dragged into the war, the institution of neutrality would never have developed so favourably as it actually has done during the nineteenth century.

Neutrality in the Twentieth Century.

§ 292. After only five years of the twentieth century have elapsed, it is difficult to say what factors will influence the development of International Law concerning neutrality during this century, and what direction this development will take. But there is no doubt that the Russo-Japanese War has produced several incidents which show that an agreement of the Powers concerning many points of neutrality is absolutely necessary. And it is to be hoped that the "wish" of the Final Act of the Hague Peace Conference—it is only one of the six there expressed—"that the question of the rights and duties of neutrals may be inserted in the programme of a Conference in the near future" will soon be fulfilled. The questions for discussion and settlement at such a Conference are enumerated and arranged by Professor Holland in the following list:[1]

(1) Are subsidised liners within the prohibition of the sale to a belligerent by a neutral Government of ships of war?

(2) Is a neutral Government bound to interfere

[1] See Holland, Neutral Duties in a Maritime War, as illustrated by recent events (1905), p. 15. From the Proceedings of the British Academy, vol. II.

with the use of its territory for the maintenance of belligerent communications by wireless telegraphy?

(3) To prevent the exit of even partially equipped war-ships?

(4) To prevent, with more care than has hitherto been customary, the exportation of supplies, especially of coal, to belligerent fleets at sea?

(5) By what specific precautions must a neutral prevent abuse of the "asylum" afforded by its ports to belligerent ships of war?—with especial reference to the bringing in of prizes, duration of stay, consequences of over-prolonged stay, the simultaneous presence of vessels of mutually hostile nationalities, repairs and approvisionment during stay, and, in particular, renewal of stocks of coal.

(6) Interruption of safe navigation over territorial waters and the High Seas respectively?

(7) The distance from the scene of operations at which the right of visit may be properly exercised?

(8) The protection from the exercise of this right afforded by the presence of neutral convoy?

(9) The time and place at which so-called "volunteer" fleets and subsidised liners may exchange the mercantile for a naval character?

(10) Immunity for mail ships, or their mail bags?

(11) The requirement of actual warning to blockade-runners, and the application to blockade of the doctrine of "Continuous Voyages"?

(12) The distinction between "absolute" and "conditional" contraband, with especial reference to food and coal?

(13) The doctrine of "Continuous Voyages" with reference to contraband?

(14) The cases, if any, in which a neutral prize

may lawfully be sunk at sea, instead of being brought in for adjudication?

(15) The due constitution of Prize Courts?

(16) The legitimacy of a rule condemning the ship herself, when more than a certain proportion of her cargo is of a contraband character?

II

Characteristics of Neutrality

Grotius, III. c. 17, § 3—Bynkershoek, Quaest. jur. publ. I. c. 9—Vattel, III. §§ 103-104—Hall, §§ 19-20—Lawrence, § 243—Phillimore, III. §§ 136-137—Halleck, II. p. 141—Taylor, § 614—Walker, § 54—Wheaton, § 412—Bluntschli, §§ 742-744—Heffter, § 144—Geffcken in Holtzendorff, IV. pp. 605-606—Gareis, § 87—Liszt, § 42—Ullmann, § 162—Bonfils, Nos. 1441 and 1443—Despagnet, No. 675—Rivier, II. pp. 368-370—Calvo, IV. §§ 2491-2493—Fiore, III. Nos. 1536-1541—Martens, II. § 129—Dupuis, No. 316—Mérignhac, pp. 349-351—Pillet, pp. 272-274—Heilborn, System, pp. 336-351—Perels, § 38—Testa, pp. 167-172—Kleen, I. §§ 1-4—Hautefeuille, I. pp. 195-200—Gessner, pp. 22-23—Schopfer, "Le principe juridique de la neutralité et son évolution dans l'histoire de la guerre" (1894).

Conception of Neutrality.

§ 293. Such States as do not take part in a war between other States are neutrals.[1] The term "neutrality" derives from the Latin *neuter*. Neutrality may be defined as *the attitude of impartiality towards belligerents adopted by third States and recognised by belligerents, such attitude creating rights and duties between the impartial States and the belligerents.* Whether or not a third State will adopt and preserve an attitude of impartiality during war

[1] Grotius (III. c. 17) calls them *non hostes qui neutrarum partium sunt.* Bynkershoek (I. c. 9) *non hostes qui neutrarum medii in bello*;

is not a matter of International Law, but of International Politics. Therefore, unless a previous treaty stipulates it expressly, no duty exists for a State, according to International Law, to remain neutral in war. On the other hand, it ought not to be maintained, although this is done by some writers,[1] that every State has by the Law of Nations a right not to remain neutral. The fact is that every Sovereign State, as an independent member of the Family of Nations, is master of its own resolutions, and that the question of remaining neutral or not is, in absence of a treaty stipulating otherwise, one of policy and not of law. However, all such States are supposed to be neutral as do not expressly declare the contrary by word or action, and the rights and duties arising from neutrality come into and remain in existence through the mere fact that a State takes up and preserves an attitude of impartiality and is not dragged into the war by the belligerents themselves. A special assertion of intention to remain neutral is, therefore, legally not necessary on the part of neutral States, although they often expressly and formally proclaim[2] their neutrality.

Neutrality an Attitude of Impartiality.

§ 294. Since neutrality is an attitude of impartiality, it excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to the one as benefit the other. But it requires, on the other hand, active measures from neutral States. For neutrals must prevent belligerents from making use of their neutral territories and of their resources for military and naval purposes during the war. This concerns not only actual fighting on neutral territories, but also transport of troops, war materials, and provisions for the

[1] See, for instance, Bonfils, No. 1443. [2] See below, § 309.

troops, the fitting out of men-of-war and privateers, the activity of Prize Courts, and the like.

But it must be specially observed that the necessary attitude of impartiality is not incompatible with sympathy with one and antipathy against the other belligerent, as long as such sympathy and antipathy are not realised in actions violating impartiality. Thus, not only public opinion and the Press of a neutral State, but also the Government, may show their sympathy to one party or another without thereby violating neutrality. And it must likewise be specially observed that acts of humanity on the part of neutrals and their subjects, such as the sending of doctors, medicine, provisions, dressing material, and the like, to military hospitals, and the sending of clothes and money to prisoners of war, can never be construed as acts of partiality, although these comforts are provided to the wounded and the prisoners of one of the belligerents only.

Neutrality an Attitude creating Rights and Duties.

§ 295. Since neutrality is an attitude during the condition of war only, this attitude calls into existence special rights and duties which do not generally obtain. They come into existence with the knowledge of the outbreak of war between two States, third States taking up the attitude of impartiality, and they expire *ipso facto* by the termination of the war.

Rights and duties deriving from neutrality do not exist before the outbreak of war, although such outbreak may be expected every moment. Even so-called neutralised States, as Switzerland and Belgium, have during time of peace no duties connected with neutrality, although as neutralised States they have even in time of peace certain duties. These duties are not duties connected with neutrality, but duties

imposed upon the neutralised States as a condition of their neutralisation. They contain restrictions for the purpose of safeguarding the neutralised States from being dragged into war.[1]

Neutrality an Attitude of States.

§ 296. As International Law is a law between States only and exclusively, neutrality is an attitude of impartiality on the part of States, and not on the part of individuals.[2] Individuals derive neither rights nor duties, according to International Law, from the neutrality of those States whose subjects they are. Neutral States are indeed obliged by International Law to prevent their subjects from committing certain acts, but the duty of these subjects to comply with such injunctions of their Sovereigns is a duty imposed upon them by Municipal, not by International Law. Belligerents, on the other hand, are indeed permitted by International Law to punish subjects of neutrals for breach of blockade, and for carriage of contraband and of analogous of contraband to the enemy; but the duty of subjects of neutrals to comply with these injunctions of belligerents is a duty imposed upon them by these very injunctions of the belligerents, and not by International Law. Although as a rule a State has no jurisdiction over foreign subjects on the Open Sea,[3] either belligerent has, exceptionally, by International Law, the right to punish foreign subjects with confiscation of cargo, and eventually of the vessel itself, in case their vessels break the blockade, carry contraband,

[1] See above, Vol. I. § 96.

[2] It should be specially observed that it is an inaccuracy of language to speak (as is commonly done in certain cases) of individuals as being neutral. Thus, article 2 of the Geneva Convention speaks of persons employed in hospitals as participating in the benefit of neutrality. Thus, further, belligerents occupying enemy territory frequently make enemy individuals who are not members of the armed forces of the enemy take a so-called oath of neutrality.

[3] See above, Vol. I. § 146.

or carry analogous of contraband to the enemy; but the punishment is threatened and executed by the belligerents, not by International Law. Therefore, if neutral merchantmen commit such acts, they neither violate neutrality nor do they act against International Law, but they simply violate injunctions of the belligerents concerned. If they want to run the risk of punishment in the form of losing their property, this is their own concern, and their neutral home State need not prevent them from doing so. But to the right of belligerents to punish subjects of neutrals for the acts specified corresponds the duty of neutral States to acquiesce on their part in the exercise of this right by either belligerent.

Moreover, apart from carriage of contraband, breach of blockade, and maritime transport to the enemy, which a belligerent can punish by capturing and confiscating the vessels or goods concerned, subjects of neutrals are perfectly unhindered in their movements, and neutral States have in especial no duty to prevent their subjects from selling arms, munitions, and provisions to a belligerent, from enlisting in his forces, and the like.

No Cessation of Intercourse during Neutrality between Neutrals and Belligerents.

§ 297. Neutrality as an attitude of impartiality involves the duty of assisting neither belligerent either actively or passively, but it does not comprise the duty of breaking off all intercourse with the belligerents. Apart from certain restrictions necessitated by impartiality, all intercourse between belligerents and neutrals takes place as before, a condition of peace prevailing between them in spite of the war between the belligerents. This applies particularly to the working of treaties, to diplomatic intercourse, and to trade. But indirectly, of course, the condition of war between belligerents may have a disturbing

influence upon intercourse between belligerents and neutrals. Thus the treaty-rights of a neutral State may be interfered with through occupation of enemy territory by a belligerent; its subjects living on such territory bear enemy character; its subjects trading with the belligerents are hampered by the right of visit and search, and the right of the belligerents to capture blockade-runners and contraband of war.

Neutrality an Attitude during War (Neutrality in Civil War).

§ 298. Since neutrality is an attitude during war, the question arises as to the necessary attitude of foreign States during civil war. As civil war becomes real war through recognition [1] of the insurgents as a belligerent Power, it is to be distinguished whether recognition has taken place or not. There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of its being at peace with the legitimate Government. But matters are different after recognition. The insurgents are now a belligerent Power, and the civil war is now real war. Foreign States can either become a party to the war or remain neutral, and in the latter case all duties and rights of neutrality devolve upon them. Since, however, recognition can be granted by foreign States independently of the attitude of the legitimate Government, and since recognition granted by the latter is not at all binding upon foreign Governments, it may happen that insurgents are granted recognition on the part of the legitimate Government, whereas foreign States refuse it, and *vice versa*.[2] In the first case, the rights and duties of neutrality devolve upon foreign States as far as the legitimate Government is concerned. Men-of-war of the latter can visit and

[1] See above, §§ 59 and 76, and Rougiers, Les guerres civiles et le droit des gens (1903), pp. 414–447.

[2] See above, § 59.

search merchantmen of foreign States for contraband; a blockade declared by the legitimate Government is binding upon foreign States, and the like. But no rights and duties of neutrality devolve upon foreign States as regards the insurgents. A blockade declared by them is not binding, their men-of-war cannot visit and search merchantmen for contraband. On the other hand, if insurgents are recognised by a foreign State but not by the legitimate Government, such foreign State has all rights and duties of neutrality as far as the insurgents are concerned, but not as far as the legitimate Government is concerned.[1] In practice, however, recognition of insurgents on the part of foreign States will, if really justified, always have the effect that the legitimate Government will no longer refuse recognition.

Neutrality to be recognised by the Belligerents.

§ 299. Just as third States have no duty to remain neutral in a war, so they have no right[2] to demand to remain neutral. History reports many cases in which States, although they intended neutrality, were obliged by one or both belligerents to make up their minds and choose the belligerent with whom they must throw in their lot. For neutrality to come into existence it is, therefore, not sufficient that at the outbreak of war a third State takes up an attitude of impartiality, but it is also necessary that the belligerents recognise this attitude by acquiescing in it and by not treating such third State as a party to the

[1] See the body of nine rules regarding the position of foreign States in case of an insurrection, adopted by the Institute of International Law at its meeting at Neuchâtel in 1900 (Annuaire, XVIII. p. 227). The question whether, in case foreign States refuse recognition to insurgents, although the legitimate Government has granted it, the legitimate Government has a right of visit and search for contraband is controverted, see Annuaire, XVIII. pp. 213–216.

[2] But many writers assert the existence of such a right; see, for instance, Vattel, § 106; Wheaton, § 414; Kleen, I. § 2.

war. This does not mean, as has been maintained,[1] that neutrality is based on a contract concluded either *expressis verbis* or by unmistakeable actions between the belligerents and third States, and that, consequently, a third State might at the outbreak of war take up the position of one which is neither neutral nor a party to the war, reserving thereby for itself the freedom of its future resolutions and actions. Since the normal relation between members of the Family of Nations is peace, the outbreak of war between some of the members has the effect that the others become neutrals *ipso facto* by their taking up an attitude of impartiality and by their not being treated by the belligerents as parties to the war. Thus, it is not a contract that calls neutrality into existence, but this condition is rather a legal consequence of a certain attitude at the outbreak of war on the part of third States, on the one hand, and, on the other, on the part of the belligerents themselves.

III

Different Kinds of Neutrality

Vattel, III. §§ 101, 105, 107, 110—Phillimore, III. §§ 138-139—Halleck, II. p. 142—Taylor, § 618—Wheaton, §§ 413-425—Bluntschli, §§ 745-748—Geffcken in Holtzendorff, IV. pp. 634-636—Ullmann, § 163—Despagnet, No. 673—Rivier, II. pp. 370-379—Calvo, IV. §§ 2592-2642—Fiore, III. Nos. 1542-1545—Mérignhac, pp. 347-349—Pillet, pp. 277-284—Kleen, I. §§ 6-22.

Perpetual Neutrality.

§ 300. The very first distinction to be made between different kinds of neutrality is that of perpetual

[1] See Heilborn, System, pp. 347 and 350.

and other neutrality. Perpetual or permanent is the neutrality of States which are neutralised by special treaties of the members of the Family of Nations, as at present Switzerland, Belgium, Luxemburg, and the Congo Free State. Apart from duties arising from the fact of their neutralisation and to be performed in time of peace as well as in time of war, the duties and rights of neutrality are the same for neutralised as for other States. It must be specially observed that this concerns not only the obligation not to assist either belligerent, but likewise the obligation to prevent them from making use of the neutral territory for their military purposes. Thus, Switzerland in 1870 and 1871, during the Franco-German War, properly prevented the transport of troops, recruits, and war material of either belligerent over her territory, disarmed the French army which had saved itself by crossing the Swiss frontier, and retained the members of this army until the conclusion of peace.[1]

General and Partial Neutrality.

§ 301. The distinction between general and partial neutrality derives from the fact that a part of the territory of a State may be neutralised,[2] as are, for instance, the Ionian Islands, which are now a part of the territory of the Kingdom of Greece. Such State has the duty to remain always partially neutral—namely, as far as its neutralised part is concerned. In contradistinction to such partial neutrality, general neutrality is the neutrality of States whose territory is in no part neutralised.

Voluntary and Conventional Neutrality.

§ 302. A third distinction is that between voluntary and conventional neutrality. Voluntary (or simple or natural) is the neutrality of such State as is not bound by a general or special treaty to remain neutral in a certain war. Neutrality is in most cases

[1] See below, § 339.

[2] See above, § 72.

voluntary, and States whose neutrality is voluntary may at any time during the war give up their attitude of impartiality and take the part of either belligerent. On the other hand, the neutrality of such State as is by treaty bound to remain neutral in a war is conventional. Of course, the neutrality of neutralised States is in every case conventional. Yet not-neutralised States may likewise by treaty be obliged to remain neutral in a certain war, just as in other cases they may by treaty of alliance be obliged not to remain neutral, but to take the part of one of the belligerents.

Armed Neutrality.

§ 303. One speaks of an armed neutrality when a neutral State takes military measures for the purpose of defending its neutrality against possible or probable attempts of one or either belligerent to make use of the neutral territory. Thus, the neutrality of Switzerland during the Franco-German War was an armed neutrality. In another sense of the term, one speaks of an armed neutrality when neutral States take military measures for the purpose of defending the real or pretended rights of neutrals against threatening infringements on the part of one or either belligerent. The First and Second Armed Neutrality [1] of 1780 and 1800 were armed neutralities in the latter sense of the term.

Benevolent Neutrality.

§ 304. Treaties stipulating neutrality often stipulate a "benevolent" neutrality of the parties regarding a certain war. The term is likewise frequently used during diplomatic negotiations. However, at present there is no distinction between benevolent neutrality and neutrality pure and simple. The idea dates from former centuries, when the obligations imposed by neutrality were not so stringent and neutral States could favour one of the belligerents in many ways

[1] See above, §§ 289 and 290.

without thereby violating their neutral attitude. If a State remained neutral in the then lax sense of the term, but otherwise favoured a belligerent, its neutrality was called benevolent.

Perfect and Qualified Neutrality.

§ 305. A distinction of great practical importance is that between perfect, or absolute, and qualified, or imperfect, neutrality. The neutrality is qualified of such State as remains neutral on the whole, but actively or passively, directly or indirectly, gives some kind of assistance to one of the belligerents in consequence of an obligation entered into by a treaty previous to the war and not for the special war exclusively. On the other hand, a neutrality is termed perfect when a neutral State neither actively nor passively, and neither directly nor indirectly, favours either belligerent. There is no doubt that in the eighteenth century, when it was recognised that a State could be considered neutral, although it was by a previous treaty bound to render more or less limited assistance to one of the belligerents, this distinction between neutrality perfect and qualified was justified. But nowadays it is controverted whether a so-called qualified neutrality is neutrality at all, and whether a State, which, in fulfilment of a treaty obligation, renders some assistance to one of the belligerents, violates its neutrality. The majority of modern writers [1] maintain, correctly I think, that from the present condition of International Law a State is either neutral or not, and that a State violates its neutrality in case it renders any assistance what-

[1] See, for instance, Ullmann, § 163; Despagnet, No. 673; Rivier, II. p. 378; Calvo, IV. § 2594; Taylor, § 618; Fiore, III. No. 1541; Kleen, I. § 21; Hall, § 215 (see also Hall, § 219, concerning passage of troops). Phillimore, III. § 138, goes with the majority of publicists, but in § 139 he thinks that it would be too rigid to consider acts of "minor" partiality which are the result of conventions previous to the war as violations of neutrality.

ever from any motive whatever to one of the belligerents. Consequently, a State which has entered into such obligations would in time of war frequently be in a conflict of duties. For in fulfilling its treaty obligations it would frequently be obliged to violate its duty of neutrality, and *vice versa*. Several writers,[1] however, maintain that such fulfilment of treaty obligations would not contain a violation of neutrality.[2]

Some Historical Examples of Qualified Neutrality.

§ 306. For the purpose of illustration the following instances of qualified neutrality may be mentioned:—

(1) By a treaty of amity and commerce concluded in 1778 between the United States of America and France, the former granted for the time of war to French privateers and their prizes the right of admission to American ports, and entered into the obligation not to admit the privateers of the enemies of France. When subsequently, in 1793, war was waged between England and France, and England complained of the admission of French privateers to American ports, the United States met the complaint by advancing their treaty obligations.[3]

(2) Denmark had by several treaties, especially by one of 1781, undertaken the obligation to furnish Russia with a certain number of men-of-war and troops. When, in 1788, during war between Russia and Sweden, Denmark fulfilled her obligations towards Russia, she nevertheless declared herself neutral. And although Sweden protested against such possibility of qualified neutrality, she acquiesced in the fact and did not consider herself to be at war against Denmark.[4]

[1] See, for instance, Heffter, § 144; Manning, p. 225; Wheaton, §§ 425–426; Bluntschli, § 746; Halleck, II. p. 142.

[2] See above, § 77, where it has been pointed out that a neutral who takes up an attitude of qualified neutrality may nowadays be considered as an accessory belligerent party to the war.

[3] See Wheaton, § 425, and Phillimore, III. § 139.

[4] See Phillimore, III. § 140.

(3) In 1848, during war between Germany and Denmark, Great Britain, fulfilling a treaty obligation towards Denmark, prohibited the exportation of arms to Germany, whereas such exportation to Denmark remained undisturbed.[1]

(4) In 1900, during the South African War, Portugal, for the purpose of complying with a treaty obligation[2] towards Great Britain regarding the passage of British troops through Portuguese territory in South Africa, allowed such passage to an English force destined for Rhodesia and landed at Beira.[3]

IV

Commencement and End of Neutrality

Hall, § 207—Phillimore, I. §§ 392–392A, III. §§ 146–149—Taylor, §§ 610–611—Wheaton, §§ 437–439, and Dana's note 215—Heffter, § 145—Bonfils, Nos. 1445–1446—Despagnet, No. 674—Rivier, II. pp. 379–381—Martens, II. § 138—Kleen, I. §§ 5, 36–42.

Neutrality commences with Knowledge of the War.

§ 307. Since neutrality is an attitude of impartiality deliberately taken up by a State not implicated in a war, neutrality cannot begin before the outbreak of war becomes known. It is only then that third States can make up their minds whether or not they intend to remain neutral. They are supposed to do this, and the duties deriving from neutrality are incumbent upon them as long as they do not *expressis verbis* or by unmistakeable acts declare that they will be parties to the war. It has become the usual practice on the part of belligerents to notify the outbreak of war

[1] See Geffcken in Holtzendorff, VI. p. 610, and Rivier, II. p. 379.

[2] Article 11 of the treaty between Great Britain and Portugal concerning the delimitation of spheres of influence in Africa. (Martens, N.R.G., 2nd ser. XVIII. p. 185.)

[3] See below, § 323, and Baty, International Law in South Africa (1900), p. 75.

to third States for the purpose of enabling them to take up the necessary attitude of impartiality, but such notification is in strict law not necessary. The mere fact that a State gets in any way to know of the outbreak of war gives it opportunity to make up its mind regarding its intended attitude, and, if it remains neutral, its neutrality is to be dated from the time of its knowledge of the outbreak of war. But it is apparent that an immediate notification of the war on the part of belligerents is of great importance, as thereby all doubt and controversy regarding the knowledge of the outbreak of war are excluded. For it must be emphasised that a neutral State can in no way be made responsible for acts of its own or of its subjects which have been performed before it knew of the war, although the outbreak of war might be expected.

Commencement of Neutrality in Civil War.

§ 308. As civil war becomes real war through recognition of the insurgents as a belligerent Power, neutrality during a civil war begins for every foreign State from the moment recognition is granted. That recognition might be granted or refused by foreign States independently of the attitude of the legitimate Government has been stated above in § 298, where also an explanation is given of the consequences of recognition granted either by foreign States alone or by the legitimate Government alone.

Establishment of Neutrality by Declarations.

§ 309. Neutrality being an attitude of States creating rights and duties, active measures on the part of a neutral state are required for the purpose of preventing its officials and subjects from committing acts incompatible with its duty of impartiality. Now, the manifesto by which a neutral State orders its organs and subjects to comply with the attitude of impartiality adopted by itself is called declaration or

neutrality in the special sense of the term. Such declaration of neutrality must, however, not be confounded, on the one hand, with manifestoes of the belligerents proclaiming to neutrals the rights and duties devolving upon them through neutrality, and, on the other hand, with the assertion given by neutrals to belligerents or *urbi et orbi* that they will remain neutral, these manifestoes and assertions being often also called declarations of neutrality.[1]

Municipal Neutrality Laws.

§ 310. International Law leaves the provision of necessary measures for the establishment of neutrality to the discretion of each State. Since in constitutional States the powers of Governments are frequently so limited by Municipal Law that they cannot take adequate measures without the consent of their Parliaments, and since it is, as far as International Law is concerned, no excuse for a Government if it is by its Municipal Law prevented from taking adequate measures, several States have once for all enacted so-called Neutrality Laws, which prescribe the attitude to be taken up by their officials and subjects in case the States concerned remain neutral in a war. These Neutrality Laws are latent in time of peace, but their provisions become operative *ipso facto* by the respective States making a declaration of neutrality to their officials and subjects.

British Foreign Enlistment Act.

§ 311. After the United States of America had on April 20, 1818, enacted [2] a Neutrality Law, Great Britain followed the example in 1819 with her Foreign Enlistment Act,[3] which was in force till 1870. As this Act did not give adequate powers to the Government, Parliament passed on August 9, 1870, a new Foreign Enlistment Act,[4] which is still in force.

[1] See above, § 293.

[2] Printed in Phillimore, I. pp. 667-672.

[3] 59 Geo. III. c. 69.

[4] 33 and 34 Vict. c. 90. See Appendix I, pp. 483-497.

This Act, in the case of British neutrality, prohibits—(1) The enlistment on the part of a British subject in the military or naval service of either belligerent, and similar acts (sections 4–7); (2) the building, equipping,[1] and despatching[2] of vessels for employment in the military or naval service of either belligerent (sections 8–9); (3) the increase, on the part of any individual living on British territory, of the armament of a man-of-war of either belligerent being at the time in a British port (section 10); (4) the preparing or fitting out of a naval or military expedition against a friendly State (section 11).

It must be specially observed that the British Foreign Enlistment Act goes beyond the require-

[1] According to section 30, the Interpretation Clause of the Act, "equipping" includes "the furnishing of a ship with any tackle, apparel, furniture, provisions, arms, munitions or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service." It is, therefore, not lawful for British ships, in case Great Britain is neutral, to supply a belligerent fleet direct with coal, a point which became of interest during the Russo-Japanese War. German steamers laden with coal followed the Russian fleet on her journey to the Far East, and British shipowners were prevented from doing the same by the Foreign Enlistment Act. And it was in application of this Act that the British Government ordered, in 1904, the detention of the German steamer "Captain W. Menzel," which took in Welsh coal at Cardiff for the purpose of carrying it to the Russian fleet *en route* to the Far East. See below, § 350.

[2] An interesting case which ought here to be mentioned occurred in October 1904, during the Russo-Japanese War. Messrs. Yarrow & Co., the ship-builders, possessed a partly completed vessel, the "Caroline," which could be finally fitted up either as a yacht or as a torpedo-boat. In September 1904, a Mr. Sinnet and the Hon. James Burke Roche called at the shipbuilding yard of Messrs. Yarrow, bought the "Caroline," and ordered her to be fitted up as a high-speed yacht. The required additions were finished on October 3. On October 6 the vessel left Messrs. Yarrow's yard and was navigated by a Captain Ryder, *via* Hamburg, to the Russian port of Libau, there to be altered into a torpedo-boat. That section 8 of the Foreign Enlistment Act applies to this case there is no doubt. But there is no doubt either that it is this Act, and not the rules of International Law, which required the prosecution of Messrs. Sinnet and Roche on the part of the British Government. For, if viewed from the basis of International Law, the case is merely one of contraband. See below, §§ 321, 334, and 397.

ments of International Law in so far as it tries to prohibit and penalises a number of acts which a neutral State is not according to the present rules of International Law required to prohibit and penalise. Thus, for instance, a neutral State need not prohibit its private subjects from enlisting in the service of a belligerent; from supplying coal, provisions, arms, and ammunition direct to a belligerent fleet, providing such fleet is not within or just outside the territorial waters of the neutral concerned; from selling ships to a belligerent although it is known that they will be converted into cruisers or used as transport ships.

End of Neutrality.

§ 312. Neutrality ends with the war, or through the commencement of war by a hitherto neutral State against one of the belligerents, or through one of the belligerents commencing war against a hitherto neutral State. Since, apart from the case of a treaty obligation, no State has by International Law the duty to remain neutral in a war between other States,[1] or, if it is a belligerent, to allow a hitherto neutral State to remain neutral,[2] it does not constitute a violation of neutrality on the part of the hitherto neutral to begin war against one of the belligerents, and on the part of a belligerent to begin war against a neutral. Duties of neutrality exist as long only as a State remains neutral. They come to an end *ipso facto* by a hitherto neutral State's throwing up its neutrality, or by a belligerent's beginning war against a hitherto neutral State. But the ending of neutrality must not be confounded with violation of neutrality. Such violation does not *ipso facto* bring neutrality to an end, as will be shown below in § 358.

[1] See above, § 293.

[2] See above, § 299.

CHAPTER II

RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS

I

Rights and Duties deriving from Neutrality

Vattel, III. § 104—Hall, § 214—Phillimore, III. §§ 136–138—Twiss, II. § 216—Heffter, § 146—Geffcken in Holtzendorff, IV. pp. 656-657—Gareis, § 88—Liszt, § 42—Ullmann, § 164—Bonfils, Nos. 1441–1444—Despagnet, Nos. 671 and 675—Rivier, II. pp. 381–385—Calvo, IV. §§ 2491–2493—Fiore, III. Nos. 1501, 1536–1540—Martens, II. § 131—Kleen, I. §§ 45–46—Mérignhac, pp. 339-342—Pillet, pp. 273-275.

Conduct in General of Neutrals and Belligerents.

§ 313. Neutrality can be carried out only if neutrals as well as belligerents follow a certain line of conduct in their relations with one another. It is for this reason that from neutrality derive rights and duties, as well for belligerents as for neutrals, and that, consequently, neutrality can be violated as well by belligerents as by neutrals. These rights and duties are correspondent: the duties of neutrals correspond to the rights of either belligerent, and the duties of either belligerent correspond to the rights of the neutrals.

What Rights and Duties of Neutrals and of Belligerents there are.

§ 314. There are two rights and two duties deriving from neutrality for neutrals, and likewise two for belligerents. Duties of neutrals are, first, to act toward belligerents in accordance with their attitude of impartiality; and, secondly, to acquiesce in the exercise on the part of either belligerent of his right to punish neutral merchantmen for breach of

blockade, carriage of contraband, and carriage of analogous of contraband for the enemy, and accordingly to visit, search, and eventually capture them.

The duties of either belligerent are, first, to act towards neutrals in accordance with their attitude of impartiality; and, secondly, not to suppress their intercourse, and in especial their commerce, with the enemy.[1]

Either belligerent has a right to demand impartiality from neutrals, whereas, on the other hand, neutrals have a right to demand such behaviour from either belligerent as is in accordance with their attitude of impartiality. Neutrals have a right to demand that their intercourse, and in especial their commerce, with the enemy shall not be suppressed; whereas, on the other hand, either belligerent has the right to punish subjects of neutrals for breach of blockade, carriage of contraband, and the like, and accordingly to visit, search, and capture neutral merchantmen.

Rights and Duties of Neutrals contested.

§ 315. Some writers[2] maintain that no rights derive from neutrality for neutrals, and, consequently no duties for belligerents, because everything which must be left undone by a belligerent regarding his relations with a neutral must likewise be left undone in time of peace. But this opinion has no foundation. Indeed, it is true that the majority of the acts which belligerents must leave undone in consequence of their duty to respect neutrality must likewise be

[1] All writers on International Law resolve the duty of impartiality incumbent upon neutrals into many several duties, and they do the same as regards the duty of belligerents—namely, to act toward neutrals in accordance with the latter's impartiality. In this way quite a large catalogue of duties and corresponding rights are produced, and the whole matter is unnecessarily complicated.

[2] Heffter, § 149; Gareis, § 88; Heilborn, System, p. 341.

left undone in time of peace in consequence of the territorial supremacy of every State. However, there are several acts which do not belong to this class—for instance, the non-appropriation of enemy goods on neutral vessels. And those acts which do belong to this class fall nevertheless at the same time under another category. Thus, a violation of neutral territory on the part of a belligerent for military and naval purposes of the war is indeed an act prohibited in time of peace, because every State has to respect the territorial supremacy of other States ; but it is at the same time a violation of neutrality, and therefore totally different from other violations of foreign territorial supremacy. This becomes quite apparent when the true inwardness of such acts is regarded. For every State has a right to demand reparation for an ordinary violation of its territorial supremacy, but it has no duty to demand such reparation, it might not take any notice of it, or overlook it. Yet in case a violation of its territorial supremacy constitutes at the same time a violation of its neutrality, the neutral State has not only a right to demand reparation, but has a duty to do so. For, if it did not, this would contain a violation of its duty of impartiality, because it would be favouring one belligerent to the detriment of the other.[1]

On the other hand, it has been asserted[2] that, apart from conventional neutrality, from which treaty obligations arise, it is incorrect to speak of duties deriving from neutrality, since at every moment during the war neutrals could throw up neutrality and become parties to the war. With this opinion I cannot agree either. That a hitherto neutral can at any moment throw up neutrality and take part

[1] See below, § 360. [2] Gareis, § 88; Ullmann, § 164.

in the war, is just as true as that a belligerent can at any moment during the war declare war against a hitherto neutral State. Yet this only proves that there is no duty to remain neutral, and no duty for a belligerent to abstain from declaring war against a hitherto neutral State. This is a truism which ought not to be doubted, and is totally different from the question what duties derive from neutrality as long as a certain State remains neutral at all. The assertion that such duties derive from neutrality is in no way inconsistent with the fact that neutrality itself can at any moment during the war come to an end through the beginning of war by either a neutral or a belligerent. This assertion only states the fact that, as long as neutrals intend neutrality and as long as belligerents intend to recognise such neutrality of third States, duties derive from neutrality for both belligerents and neutrals.

Contents of Duty of Impartiality.

§ 316. It has already been stated above, in § 294, that impartiality *excludes* such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to one of the belligerents as benefit the other, and that it *includes* active measures on the part of neutrals for the purpose of preventing belligerents from making use of neutral territories and neutral resources for their military and naval purposes. But all this does not exhaust the contents of the duty of impartiality.

It must, on the one hand, be added that according to the present strict conception of neutrality the duty of impartiality of a neutral *excludes* any facilities whatever for military and naval operations of the belligerents, even if granted to both belligerents alike. In former times assistance was not considered a violation of neutrality, provided it was given to

both belligerents in the same way, and States were considered neutral although they allowed an equal number of their troops to fight on the side of either belligerent. To-day this could no longer happen. And the majority of writers agree that any facility whatever directly concerning military or naval operations, even if it consists only in granting passage over neutral territory to belligerent forces, is illegal, although granted to both belligerents alike. *The duty of impartiality comprises to-day abstention from any active or passive co-operation with belligerents.*

On the other hand, it must be added that the duty of impartiality *includes* the equal treatment of both belligerents regarding such facilities as do not directly concern military or naval operations, and which may, therefore, be granted or not to belligerents, according to the discretion of a neutral. If a neutral grants such facilities to one belligerent, he must grant them to the other in the same degree. If he refuses them to the one, he must likewise refuse them to the other. Thus, since it does not, according to the International Law of the present day, constitute a violation of neutrality that a neutral allows his subjects to supply in the ordinary way of trade either belligerent with arms and ammunition, it would constitute a violation of neutrality to prohibit the export of arms destined for one of the belligerents only. Thus, further, if a neutral allows men-of-war of one of the belligerents to bring their prizes into neutral ports, he must grant the same facility to the other belligerent.[1]

Duty of Impartiality continuously

§ 317. Although neutrality has already for centuries been recognised as an attitude of impartiality,

[1] See the cases quoted above in § 306.

growing more intense.

it took two hundred years for the duty of impartiality to attain its present range and intensity. Now this continuous developement has by no means ceased. It is slowly and gradually going on, and there is no doubt that during the twentieth century the duty of impartiality will become much more intense than it is at present. The fact that the intensity of this duty is the result of gradual development bears upon many practical questions regarding the conduct of neutrals. It is therefore necessary to discuss the relations between neutrals and belligerents separately for the purpose of ascertaining what line of conduct must be followed by neutrals. The following sections of this chapter will therefore deal with—Neutrals and Military Operations (§§ 320–328); Neutrals and Military Preparations (§§ 329–335); Neutral Asylum to Soldiers and War Materials (§§ 336–341); Neutral Asylum to Naval Forces (§§ 342–348); Supplies and Loans to Belligerents (§§ 349–352); Services to Belligerents (§§ 353–356).

Contents of Duty of Belligerents to treat Neutrals in accordance with their Impartiality.

§ 318. Whereas the relations between neutrals and belligerents require detailed discussion with regard to the duty of impartiality incumbent upon neutrals, the contents of the duty of belligerents to treat neutrals in accordance with their impartiality are so manifest as to dispense with elaborate treatment. Such duty *excludes*, first, any violation of neutral territory for military or naval purposes of the war; and, secondly, the appropriation of neutral goods, contraband excepted, on enemy vessels.[1] On the other hand, such duty *includes*, first, due treatment of neutral diplomatic envoys accredited to the

[1] This is stipulated by the Declaration of Paris, 1856; see below, Appendix II. (p. 498).

enemy and found on occupied enemy territory; and, secondly, due treatment of neutral subjects and neutral property on enemy territory. A belligerent who conquers enemy territory must at least grant to neutral envoys accredited to the enemy the right to quit unmolested the occupied territory.[1] And such belligerent must likewise abstain from treating neutral subjects and property established on enemy territory more harshly than the laws of war allow; for, although neutral subjects and property have by being established on enemy territory acquired enemy character, they have nevertheless not lost the protection of their neutral home State.[2] And such belligerent must, lastly, pay full damages in case he makes use of his right of angary[3] against neutral property transitorily on enemy territory.

Contents of Duty not to suppress Intercourse between Neutrals and the Enemy.

§ 319. The duty of either belligerent not to suppress intercourse of neutrals with the enemy requires no detailed discussion either. It is a duty which is in accordance with the development of the institution of neutrality. It is of special importance with regard to commerce of subjects of neutrals with belligerents, since formerly attempts have frequently been made to intercept all neutral trade with the enemy. A consequence of the now recognised freedom of neutral commerce with either belligerent is the rule, enacted by the Declaration of Paris of 1856, that enemy goods, with the exception of contraband, on neutral vessels on the Open Sea or in enemy territorial waters cannot be appropriated by a belligerent. But the recognised freedom of

[1] The position of foreign envoys found by a belligerent on occupied enemy territory is not settled as regards details. But there is no doubt that a certain consideration is due to them, and that they must at least be granted the right to leave. See above, vol. I. § 399.

[2] See above, § 90.

[3] See below, §§ 364–367.

neutral commerce necessitates, on the other hand, certain measures on the part of belligerents. It would be unreasonable to impose on a belligerent a duty not to prevent the subjects of neutrals from breaking a blockade established by him; further, from carrying contraband to the enemy; and, lastly, from rendering services of maritime transport to the enemy. International Law gives, therefore, a right to either belligerent to interdict all such acts to neutral merchantmen, and, accordingly, to visit, search, capture, and punish them.[1]

II

Neutrals and Military Operations

Vattel, III. §§ 105, 118–135—Hall, §§ 215, 219, 220, 226—Lawrence, §§ 253–255—Manning, pp. 225–227, 245–250—Twiss, II. §§ 217, 218, 228—Halleck, II. pp. 146, 165, 172—Taylor, §§ 618, 620, 632, 635—Walker, §§ 55, 57, 59–61—Wharton, III. §§ 397–400—Wheaton, §§ 426–429—Bluntschli, §§ 758, 759, 763, 765, 769–773—Heffter, §§ 146–150—Geffcken in Holtzendorff, IV. pp. 657–676—Ullmann, § 164—Bonfils, Nos. 1449–1457, 1460, 1469, 1470—Rivier, II. pp. 395–408—Calvo, IV. §§ 2644–2664, 2683—Fiore, III. Nos. 1546–1550, 1574–1575, 1582–1584—Martens, II. §§ 131–134—Kleen, I. §§ 70–75, 116–122—Mérignhac, pp. 352–380—Pillet, pp. 284–289—Perels, § 39—Testa, pp. 173–180—Heilborn, Rechte, pp. 4–12—Dupuis, Nos. 308–310, 315–317.

Hostilities by and against Neutrals.

§ 320. The duty of impartiality incumbent upon a neutral must obviously prevent him from committing hostilities against either belligerent. This needs no mention were it not for the purpose of distinction between hostilities on the one hand, and, on the other,

[1] That a subject of a neutral State who tries to break a blockade, or carries contraband to the enemy, or renders the enemy services of maritime transport by carrying analogous of contraband, does violate injunctions of the belligerent concerned, but not International Law, will be shown below, §§ 383, 398, and 407.

military or naval acts of force by a neutral for the purpose of repulsing violations of his neutrality committed on the part of either belligerent. Hostilities of a neutral are acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and the belligerent concerned. If, however, a neutral does not attack a belligerent, but only repulses him by force when he violates or attempts to violate the neutrality of the neutral, such repulse does not comprise hostilities. Thus, if men-of-war of a belligerent attack an enemy vessel in a neutral port and are repulsed by neutral men-of-war, or if belligerent forces try to enforce a passage through neutral territory and are forcibly prevented by neutral troops, no hostilities have been committed by the neutral, who has done nothing else than fulfil his duty of impartiality. It must specially be emphasised that it is no longer legitimate for a belligerent to pursue military or naval forces who take refuge on neutral territory. Should, nevertheless, a belligerent do this, he must, if possible, be repulsed by the neutral.

It is, on the other hand, likewise obvious that hostilities against a neutral on the part of either belligerent are acts of war, and not mere violations of neutrality. If, however, belligerent forces attack enemy forces which have taken refuge on neutral territory or which are there for other purposes, such acts are not hostilities against the neutral, but mere violations of neutrality which must be repulsed or for which reparation must be made, as the case may be.

Quite a peculiar condition arose at the outbreak of and during the Russo-Japanese War. The ends for which Japan went to war were the expulsion of the

Russian forces from the Chinese Province of Manchuria and the liberation of Korea from the influence of Russia. Manchuria and Korea became therefore the theatre of war, although both were neutral territories and although neither China nor Korea became parties to the war. The hostilities which occurred on these neutral territories were in no wise directed against the neutrals concerned. This anomalous condition of matters arose out of the inability of both China and Korea to free themselves from Russian occupation and influence. And Japan considered her action, which must be classified as an intervention, justified on account of her vital interests. The Powers recognised this anomalous condition by influencing China not to take part in the war and by influencing the belligerents not to extend military operations beyond the borders of Manchuria. Manchuria and Korea having become the theatre of war,[1] the hostilities committed there by the belligerents against one another cannot be classified as a violation of neutrality. The case of the "Variag" and the "Korietz" on the one hand, and, on the other, the case of the "Reshitelni," may illustrate the peculiar condition of affairs.

(1) On February 8, 1904, a Japanese squadron under Admiral Uriu entered the Korean harbour of Chemulpo and disembarked Japanese troops. The next morning Admiral Uriu requested the commanders of two Russian ships in the harbour of Chemulpo, the "Variag" and the "Korietz," to leave the harbour and engage him in battle outside, threatening attack inside the harbour in case they would not comply with his request. But the Russian ships did comply, and the battle took place outside,

[1] See above, § 71, p. 81, and Lawrence, War, pp. 268–294.

but within Korean territorial waters.[1] The Russian complaint that the Japanese violated in this case Korean neutrality would seem to be unjustified, since Korea fell within the region and the theatre of war.

(2) The Russian destroyer "Reshitelni," one of the vessels that escaped from Port Arthur on August 10, 1904, took refuge in the Chinese harbour of Chifu. On August 12, two Japanese destroyers entered the harbour, captured the "Reshitelni," and towed her away.[2] There is no doubt that this act of the Japanese comprises a violation of neutrality,[3] since Chifu does not belong to the part of China which fell within the region of war.

Furnishing of Troops and Men-of-War to Belligerents.

§ 321. If a State remains neutral, it violates its impartiality by furnishing a belligerent with troops or men-of-war. And it matters not whether a neutral renders such assistance to one of the belligerents or to both alike.

However, the question is controverted whether a neutral State, which has in time of peace concluded a treaty with one of the belligerents to furnish him in case of war with a limited number of troops, violates its neutrality by fulfilling its treaty obligation. Several writers [4] answer the question in the negative, and there is no doubt that during the eighteenth century such cases have happened. But no case has, as far as I know, happened during the nineteenth century, and the majority of writers are now correctly of opinion that such furnishing of troops constitutes a violation of neutrality.

[1] See Lawrence, War, pp. 279–289.

[2] See Lawrence, War, pp. 291–294.

[3] See below, § 361, where the case of the "General Armstrong" is discussed.

[4] See, for instance, Bluntschli, § 759, and Heffter, § 144. See above, § 306 (2), where the case is quoted of Denmark furnishing troops to Russia in 1788 during a Russo-Swedish war.

As regards furnishing of men-of-war to belligerents, the question arose during the Russo-Japanese War whether a neutral violates his duty of impartiality by allowing his national steamship companies to sell to a belligerent such of their liners as are in case of war destined to be incorporated as cruisers in the national navy. The question was discussed in the Press on account of the sale to Russia of the "Augusta Victoria" and the "Kaiserin Maria Theresia" by the North German Lloyd, and the "Fürst Bismarck" and the "Columbia" by the Hamburg-American Line, vessels which were at once enrolled in the Russian Navy as second-class cruisers, re-christened as the "Kuban," "Ural," "Don," and "Terek." Had these vessels, according to an arrangement with the German Government, really been auxiliary cruisers to the German Navy, and provided the German Government gave its consent to the transaction, a violation of neutrality would have been committed by Germany. But the German Press maintained that these vessels had not been auxiliary cruisers to the Navy, and Japan did not lodge a protest with Germany on account of the sale. And if these liners were not auxiliary cruisers to the German Navy, their sale to Russia was a legitimate sale of articles of contraband.[1]

Subjects of Neutrals fighting among Belligerent Forces.

§ 322. The duty of impartiality incumbent upon neutrals does not at present include any necessity for them to prevent their private subjects from enlisting in the military or naval service of the belligerents, although several States, as Great Britain[2] and the United States of America, by their Municipal Law prohibit their subjects from doing so. But a neutral must recall his military and naval officers who may have

[1] See below, § 397.
[2] See Section 4 of the Foreign Enlistment Act, 1870.

been serving in the army or navy of either belligerent before the outbreak of war. A neutral must, further, retain military and naval officers who want to resign their commissions for the obvious purpose of enlisting in the service of either belligerent. The fact, therefore, that in 1877, during war between Turkey and Servia, Russian officers left the Russian and entered the Servian Army as volunteers with permission of the Russian Government, contained a violation of the duty of impartiality on the part of neutral Russia.

On the other hand, there is no violation of neutrality in a neutral allowing surgeons and such other non-combatant members of his army as are vested with neutral character according to the Geneva Convention to enlist or to remain in the service of either belligerent.

Passage of Troops and War Material through Neutral Territory.

§ 323. In contradistinction to the practice of the eighteenth century,[1] it is now generally recognised that a violation of the duty of impartiality is involved when a neutral allows a belligerent the passage of troops or the transport of war material over his territory. And it matters not whether a neutral give such permission to one of the belligerents only, or to both alike. The practice of the eighteenth century was a necessity, since many German States consisted of parts distant from one another, so that their troops had to pass through other Sovereigns' territories for the purpose of reaching outlying parts. At the beginning of the nineteenth century the passing of belligerent troops through neutral territory still occurred. Prussia, although she at first repeatedly refused it, at last entered in 1805 into a secret convention with Russia granting Russian troops passage through Silesia

[1] See Vattel, III. §§ 119–132.

during war with France. On the other hand, even before Russia had made use of this permission, Napoleon ordered Bernadotte to march French troops through the then Prussian territory of Anspach without even asking the consent of Prussia. In spite of the protest of the Swiss Government, Austrian troops passed through Swiss territory in 1813, and when in 1815 war broke out again through the escape of Napoleon from the Island of Elba and his return to France, Switzerland granted to the allied troops passage through her territory.[1] But since that time it became generally recognised that all passage of belligerent troops through neutral territory must be prohibited, and the Powers declared *expressis verbis* in the Act of November 20, 1815, which neutralised Switzerland, and was signed at Paris,[2] that "no inference unfavourable to the neutrality and inviolability of Switzerland can and must be drawn from the facts which have caused the passage of the allied troops through a part of the territory of the Swiss Confederation." The few instances[3] in which during the nineteenth century States pretended to remain neutral, but nevertheless allowed the troops of one of the belligerents the passage through their territory, led to war between the neutral and the other belligerent.

However, just as in the case of furnishing troops so in the case of passage, it is a moot point whether passage of troops can be granted without thereby violating the duty of impartiality incumbent upon a neutral, in case a neutral is required to grant it in consequence of an existing State-servitude or of a treaty previous to the war. The majority of writers,

[1] See Wheaton, §§ 418-420. [2] See Martens, N.R., II. p. 741.
[3] See Heilborn, Rechte, pp. 8-9.

correctly I think, maintain that, according to the present intensity of the duty of impartiality incumbent upon neutrals, the question must be answered in the negative.[1]

Passage of Wounded through Neutral Territory.

§ 324. Different from the passage of troops is that of wounded soldiers. If a neutral grants such passage, he certainly does not render direct assistance to the belligerent concerned. But it may well be that indirectly it contains assistance on account of the fact that a belligerent, thereby relieved from transport of his wounded, can now use the lines of communication for the transport of troops, war material, and provisions. Thus, when in 1870 after the battles of Sedan and Metz, Germany applied to Belgium and Luxemburg to allow her wounded to be sent through their territories, France protested on the ground that the relief thereby created to the lines of communication in the hands of the Germans would be an assistance to the military operations of the German Army. Belgium, on the advice of Great Britain, did not grant the German application, but Luxemburg granted it.[2]

Article 59 of the Hague Regulations expressly now authorises a neutral to grant the passage of wounded to a belligerent under the condition that trains bringing the wounded shall carry neither combatants nor war material, and that those among the wounded who belong to the army of the other belligerent shall remain on the neutral territory, shall there be guarded by the neutral Government, and shall, after they have recovered, be prevented from returning to their home State and rejoining

[1] See above, §§ 306, and also above, vol. I. § 207. Clauss, Die Lehre von den Staatsdienstbarkeiten (1894), pp. 212–217, must likewise be referred to.

[2] See Hall, § 219, and Geffcken in Holtzendorff, IV. p. 664.

their corps. Through the stipulation of this article 59 it is left to the consideration of a neutral whether he will or will not grant the passage of wounded. He will, therefore, have to investigate every case and come to a conclusion according to its merits.

Passage of Men-of-War.

§ 325. In contradistinction to passage of troops through his territory, the duty of impartiality incumbent upon a neutral does not require him to exclude the passage of belligerent men-of-war through the maritime belt of sea making a part of his territorial waters. Since, as stated above in Vol. I. § 188, every littoral State can even in time of peace prohibit the passage of foreign men-of-war through its maritime belt, provided such belt does not form a part of the highways for international traffic, it can certainly prohibit the passage of belligerent men-of-war in time of war. However, no duty exists for a neutral to prohibit such passage in time of war, and he need not exclude belligerent men-of-war from his ports either, although he can do this likewise. The reason is that such passage and such admittance into ports contains very little assistance indeed, and is justified by the character of the sea as an international high road. But it is, on the other hand, obvious that belligerent men-of-war must not commit any hostilities against enemy vessels during their passage, and must not use the neutral maritime belt and neutral ports as a basis for their operations against the enemy.[1]

Occupation of Neutral Territory by Belligerents.

§ 326. In contradistinction to the practice of the eighteenth century,[2] the duty of impartiality must nowadays prevent a neutral from permitting to belligerents the occupation of a neutral fortress or any other part of neutral territory. If a previous

[1] See below, § 333.

[2] See Kleen, I. § 116.

treaty should have stipulated such occupation, the latter cannot be granted without violation of neutrality.[1] On the contrary, the neutral must even use force to prevent belligerents from occupying any part of his neutral territory. The question whether such occupation on the part of a belligerent could be justified in the case of extreme necessity on account of the neutral's inability to prevent the other belligerent from making use of the neutral territory as a base for his military operations must, I think, be answered in the affirmative, since an extreme case of necessity in the interest of self-preservation must be considered as an excuse.[2]

Prize Courts on Neutral Territory.

§ 327. It is now generally recognised that the duty of impartiality prevents a neutral from permitting a belligerent to set up Prize Courts on neutral territory. The intention of a belligerent in setting up a court on neutral territory can only be to facilitate the plundering of the commerce of the enemy by his men-of-war. A neutral tolerating such Prize Courts would, therefore, indirectly assist the belligerent in his naval operations. During the eighteenth century it was not considered at all illegitimate on the part of neutrals to allow the setting up of Prize Courts on their territory. The *Règlement du Roi de France concernant les prises qui seront conduites dans les ports étrangers, et des formalités que doivent remplir les Consuls de S.M. qui y sont établis* of 1779, furnishes a striking proof of it.

[1] See Klüber, § 281, who asserts the contrary.

[2] See Vattel, III. § 122; Bluntschli, § 782; Calvo, IV. § 2642. Kleen, I. § 116, seems not to recognise an extreme necessity of the kind mentioned above as an excuse.—There is a difference between this case and the case which arose at the outbreak of the Russo-Japanese War, when both belligerents invaded Korea, for it was explained above in § 320 that Korea and Manchuria fell within the region and the theatre of war.

But since in 1793 the United States of America disorganised the French Prize Courts set up by the French envoy Genêt on her territory,[1] it became recognised that such Prize Courts are inconsistent with the duty of impartiality incumbent upon a neutral.

Sale of Prizes, and their Safe-keeping on Neutral Territory.

§ 328. It would, no doubt, be an indirect assistance to naval operations of a belligerent if a neutral would allow him to organise on neutral territory sales of prizes or their safe-keeping. Indeed, at present it is still in the discretion of a neutral whether he will or will not temporarily admit into a neutral port a belligerent man-of-war in company with her prize.[2] If a neutral, however, were to allow a belligerent to use neutral ports as shelters where prizes might be kept safe from recapture, he would undoubtedly assist naval operations of the belligerent and thereby violate his duty of impartiality.

But different from the organisation of sales of prizes or of their safe-keeping on neutral territory is the exceptional case of sale or safe-keeping of an unseaworthy prize. Although a neutral need not admit or keep such prize, or admit its sale, he can do it without being considered to render assistance to the belligerent concerned; but he can admit the sale only after the competent Prize Court has condemned the vessel.[3]

[1] See above, § 291 (1).

[2] But most maritime States no longer admit men-of-war in company with their prizes.

[3] See Kleen, I. § 115.

III

Neutrals and Military Preparations

Hall, §§ 217-218, 221-225—Lawrence, §§ 256-263—Manning, pp. 227-244—Phillimore, III. §§ 142-151B—Twiss, II. §§ 223-225—Halleck, II. pp. 152-163—Taylor, §§ 616, 619, 626-628—Walker, §§ 62-66—Wharton, III. §§ 392, 395-396—Wheaton, §§ 436-439—Heffter, §§ 148-150—Geffcken in Holtzendorff, IV. pp. 658-660, 676-684—Ullmann, § 164—Bonfils, Nos. 1458-1459, 1464-1466—Rivier, II. pp. 395-408—Calvo, IV. §§ 2619-2627—Fiore, III. Nos. 1551-1570—Kleen, I. §§ 76-89, 114—Mérignhac, pp. 358-360—Pillet, pp. 288-290—Dupuis, Nos. 322-331.

Depôts and Factories on Neutral Territory.

§ 329. Although according to the present intensity of the duty of impartiality neutrals need not[1] prohibit their subjects from supplying belligerents with arms and the like in the ordinary way of trade, a neutral must[2] prohibit belligerents from erecting and maintaining on his territory depôts and factories of arms, ammunitions, and military provisions. However, belligerents can easily evade this by not keeping depôts and factories, but contracting with subjects of the neutral concerned in the ordinary way of trade for any amount of arms, ammunition, and provisions.[3]

Levy of Troops, and the like.

§ 330. In former centuries neutrals were not required to prevent belligerents from levying troops on their neutral territories, and a neutral often used to levy troops himself on his territory for belligerents without thereby violating his duty of impartiality as understood in those times. In this way the Swiss Confederation frequently used to furnish belligerents,

[1] See below, § 350.

[2] See Bluntschli, § 777, and Kleen, I. § 114.

[3] The distinction made by some writers between an occasional supply on the one hand, and, on the other, an organised supply in large proportions by subjects of neutrals, and the assertion that the latter must be prohibited by the neutral concerned, is not justified. See below, § 350.

and often both parties, with thousands of recruits, although she herself always remained neutral. But at the end of the eighteenth century a movement started tending to change this practice. In 1793 the United States of America interdicted the levy of troops on her territory for belligerents, and by-and-by many other States followed the example. At present the majority of writers maintain, correctly I think, that the duty of impartiality must prevent a neutral from allowing the levy of troops. The few[1] writers who still differ make it a condition that a neutral, if he allows such levy at all, must allow it to both belligerents alike.

His duty of impartiality must likewise prevent a neutral from allowing a belligerent man-of-war reduced in her crew to enrol sailors in his ports, with the exception of such few men as are absolutely necessary for the vessel to enable her to navigate to the nearest home port.[2]

A pendant to the levy of troops on neutral territory was the granting of Letters of Marque to vessels belonging to the merchant marine of neutrals. Since privateering has practically disappeared, the question need not be discussed whether neutrals must prohibit their subjects from accepting Letters of Marque from a belligerent.[3]

Passage of Bodies of Men intending to enlist.

§ 331. A neutral is not obliged by his duty of impartiality to interdict passage through his territory to men either singly or in numbers intending to enlist. Thus in 1870 Switzerland did not object to Frenchmen travelling through Geneva for the pur-

[1] See, for instance, Twiss, II. § 225, and Bluntschli, § 762.

[2] See below, §§ 333 (3), and 346.

[3] See above, § 83. To the assertion of many writers that a subject of a neutral who accepts Letters of Marque from a belligerent can be treated as a pirate, I cannot consent. See above, Vol. I. § 273.

pose of reaching French corps and to Germans travelling through Basle for the purpose of reaching German corps, under the condition, however, that these men travelled without arms and uniform. On the other hand, when France during the Franco-German War organised an office [1] in Basle for the purpose of sending bodies of Alsatian volunteers through Switzerland to the South of France, Switzerland correctly prohibited this on account of the fact that this *official* organisation of the passage of volunteers through her neutral territory was more or less equal to a passage of troops.

Organisation of Hostile Expeditions.

§ 332. If the levy and passage of troops must be prevented by a neutral, he is all the more required to prevent the organisation of a hostile expedition from his territory against either belligerent. Such organisation takes place when a band of men combine under a commander for the purpose of starting from the neutral territory and joining the belligerent forces. Different, however, is the case in which a number of individuals, not organised into a body under a commander, start in company from a neutral State for the purpose of enlisting with one of the belligerents. Thus in 1870, during the Franco-German War, 1,200 Frenchmen started from New York in two French steamers for the purpose of joining the French Army. Although the vessels carried also 96,000 rifles and 11,000,000 cartridges, the United States did not interfere, since the men were not organised in a body, and since, on the other hand, the arms and ammunition were carried in the way of ordinary commerce.[2]

Use of Neutral Territory as Base of

§ 333. Although a neutral is not required by his duty of impartiality to prohibit the passage of belli-

[1] See Bluntschli, § 770.

[2] See Hall, § 222.

Naval Operations.

gerent men-of-war through his maritime belt, and the temporary stay of such vessels in his ports, it is generally recognised that he must not allow admitted vessels to make the neutral maritime belt and neutral ports the base of their naval operations against the enemy. The following rules may be formulated as emanating from this principle :—

(1) A neutral must, as far as is in his power, prevent belligerent men-of-war from cruising within his portion of the maritime belt for the purpose of capturing enemy vessels as soon as they leave this belt. It must, however, be specially observed that a neutral is not required to prevent this beyond his power. It is absolutely impossible to prevent such cruising under all circumstances and conditions, especially in the case of neutrals who own possessions in distant parts of the globe. How many thousands of vessels would, for instance, be necessary, if Great Britain were unconditionally obliged to prevent such cruising in every portion of the maritime belt of all her numerous possessions scattered over all parts of the globe ?

(2) A neutral must prevent a belligerent man-of-war from leaving a neutral port at the same time as an enemy man-of-war or an enemy merchantman, or must make other arrangements which prevent an attack as soon as both reach the Open Sea.[1]

(3) A neutral must prevent a belligerent man-of-war, whose crew is reduced from any cause whatever, from enrolling sailors in his neutral ports, with the exception of such few hands as are necessary for the purpose of safely navigating the vessel to the nearest port of her home State.[2]

[1] See below, § 347. [2] See above, § 33c.

(4) A neutral must prevent belligerent men-of-war admitted to his ports or maritime belt from taking in more provisions and coal than are necessary to bring them safely to the nearest port of their home State, for otherwise he would enable them to cruise on the Open Sea near his maritime belt for the purpose of attacking enemy vessels. And it must be specially observed that it matters not whether the man-of-war concerned intends to buy provisions and coal on land or to take them in from transport vessels which accompany or meet her in neutral waters.

(5) A neutral must prevent belligerent men-of-war admitted into his ports or maritime belt from replenishing with ammunition and armaments, and from adding to their armaments, as otherwise he would indirectly assist them in preparing for hostilities. And it matters not whether the ammunition and armaments are to come from the shore or are to be taken in from transport vessels.

(6) A neutral must prevent belligerent men-of-war admitted into his ports from remaining there longer than is necessary for ordinary and legitimate purposes.[1] It cannot be said that the rule adopted in 1862 by Great Britain, and followed by some other maritime States, not to allow a longer stay than twenty-four hours, is a rule of International Law. It is left to the consideration of neutrals to adopt any rule they think fit as long as the admitted men-of-war do not prolong their stay for any other than ordinary and legitimate purposes. But a neutral would certainly violate his duty of impartiality if he were to allow belligerent men-of-war to winter in his ports or to stay there for the

[1] See below, § 343.

purpose of waiting for other vessels of the fleet or transports.

This rule became of considerable importance during the Russo-Japanese War, when the Russian Baltic Fleet was on the way to the Far East. Admiral Rozhdestventsky is said to have stayed in the French territorial waters of Madagascar from December 1904 till March 1905, for the purpose of awaiting and joining there a part of the Baltic Fleet that had set out at a later date. The Press likewise reported a prolonged stay by parts of the Baltic Fleet during April 1905 at Kamranh Bay and Hon-kohe Bay in French Indo-China. Provided the reported facts be true, France would seem to have violated her duty of impartiality by not preventing such an abuse of her neutral ports.

Building and Fitting-out of Vessels intended for Naval Operations.

§ 334. Whereas a neutral is in no[1] wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, it is now getting more and more generally recognised that his duty of impartiality requires him to prevent his subjects from building, fitting out, and arming to order of either belligerent vessels intended to be used as men-of-war or privateers. The difference between selling armed vessels to belligerents on the one hand, and building them to order on the other hand, is usually defined in the following way :

An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided she is not manned in a neutral port so that she can commit hostilities at once after having reached the Open Sea. A subject of a neutral who builds an armed ship, or arms a merchantman not

[1] See below, §§ 350 and 397.

to order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms intending to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a port of the belligerent. In the case of the "La Santissima Trinidad"[1] (1822), as in that of the "Meteor"[2] (1866), American courts have recognised this.[3]

On the other hand, if a subject of a neutral builds armed ships to order of a belligerent, he prepares the means of naval operations, since the ships on sailing outside the territorial waters of the neutral and taking in a crew and ammunition can at once commit hostilities. Thus, through carrying out the order of the belligerent, the neutral territory concerned has been made the base of naval operations. And as the duty of impartiality includes the obligation of the neutral to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war.

This distinction, although perhaps logically correct, is hair-splitting. It only shows the necessity that neutral States ought[4] to be required to prevent their subjects from supplying arms, ammunition, and the like, to belligerents. But so long as this progress is not made, the above distinction will probably continue to be drawn, in spite of its hair-splitting character.

[1] 7 Wheaton, § 340.
[2] See Wharton, III. § 396, p. 561.
[3] See Phillimore, III. § 151B, and Hall, § 224.
[4] See below, § 350.

The "Alabama" Case, and the Three Rules of Washington.

§ 335. The movement for recognition of the fact that the duty of impartiality requires a neutral to prevent his subjects from building and fitting out to order of belligerents vessels intended for naval operations, began with the famous case of the "Alabama." It is not necessary to go into all the details [1] of this case. It suffices to say that in 1862, during the American Civil War, the attention of the British Government was drawn by the Government of the United States to the fact that a vessel was built in England to order of the insurgents for warlike purposes. This vessel, afterwards called the "Alabama," left Liverpool in July 1862 unarmed, but was met at the Azores by three other vessels, also coming from England, which supplied her with guns and ammunition, so that she could at once begin to prey upon the merchantmen of the United States. On the conclusion of the Civil War, the United States claimed damages from Great Britain for the losses sustained by her merchant marine through the operations of the "Alabama" and other vessels likewise built in England. Negotiations went on for several years, and finally the parties entered, on May 8, 1871, into the Treaty of Washington [2] for the purpose of having their difference settled by arbitration, five arbitrators to be nominated—one to be chosen by Great Britain, the United States, Brazil, Italy, and Switzerland. The treaty contained three rules, since then known as "The Three Rules of Washington," to be binding upon the arbitrators, namely :—

[1] See Mountague Bernard, Neutrality of Great Britain during the American Civil War (1870) pp. 338–496; Geffcken, Die Alabama Frage (1872); Pradier-Fodéré, La Question de l'Alabama (1872); Caleb Cushing, Le Traité de Washington (1874); Bluntschli in R.I., II. (1870) pp. 452–485.

[2] Martens, N.R.G., XX. p. 698.

"A neutral Government is bound—

"*First.* To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a Power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction, to warlike use.

"*Secondly.* Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"*Thirdly.* To exercise due diligence in its waters, and as to all persons within its jurisdiction, to prevent any violations of the foregoing obligations and duties."

In consenting that these rules should be binding upon the arbitrators, Great Britain declared expressly that in spite of her consent she maintained that these rules were not recognised rules of International Law at the time when the case of the "Alabama" occurred, and the treaty contains also the stipulation that the parties—

"Agree to observe these rules as between themselves in future, and to bring them to the knowledge of other Maritime Powers, and to invite them to accede to them."

The appointed arbitrators met at Geneva in 1871, held thirty-two conferences there, and gave decision [1]

[1] The award is printed in its full extent in Phillimore, III. § 151, and Wharton, III. § 420A.

on September 14, 1872, according to which England had to pay 15,500,000 dollars damages to the United States.

The arbitrators put a construction upon the term *due diligence*[1] and asserted other opinions in their decision which are very much contested and to which Great Britain never consented. Thus, Great Britain and the United States, although they agreed upon the three rules, do not at all agree upon the interpretation thereof, and they could, therefore, likewise not agree upon the contents of the communication to other maritime States stipulated by the Treaty of Washington. It cannot, therefore, be said that the Three Rules of Washington have become general rules of International Law. Nevertheless, they were the starting-point of the movement for the general recognition of the fact that the duty of impartiality obliges neutrals to prevent their subjects from building and fitting out to order of belligerents vessels intended for warlike purposes.[2]

[1] See below, § 363.

[2] Attention must be drawn to the fact that the Institute of International Law in 1875, at its meeting at the Hague, adopted a body of seven rules emanating from the Three Rules of Washington. See Annuaire, I. (1877) p. 139.

IV

Neutral Asylum to Land Forces and War Material

Vattel, III. §§ 132–133—Hall, §§ 226 and 230—Halleck, II. p. 150—Taylor, § 621—Wharton, III. § 394—Bluntschli, §§ 774, 776–776A, 785—Heffter, § 149—Geffcken in Holtzendorff, IV. pp. 662–665—Ullmann, § 164—Bonfils, Nos. 1461–1462—Rivier, II, pp. 395–398—Calvo, IV. §§ 2668–2669—Fiore, III. Nos. 1576, 1582, 1583—Martens, II. § 133—Mérignhac, pp. 370–376—Pillet, pp. 286–287—Kleen, II. §§ 151–157—Holland, War, Nos. 101–106—Heilborn, "Rechte und Pflichten der neutralen Staaten in Bezug auf die während des Krieges auf ihr Gebiet übertretenden Angehörigen einer Armee und das dorthingebrachte Kriegsmaterial der kriegführenden Parteien" (1888), pp. 12–83—Rolin-Jaequemyns in R.I., III. (1871), pp. 352–366.

On Neutral Asylum in general.

§ 336. Neutral territory, being outside the region of war,[1] offers an asylum to members of belligerent forces, to the subjects of the belligerents and their property, and to war material of the belligerents. Since, according to the present rules of International Law, the duty of either belligerent to treat neutrals according to their impartiality must—the case of extreme necessity for self-preservation excepted—prevent them from violating the territorial supremacy of neutrals, enemy persons as well as enemy goods are perfectly safe on neutral territory. It is true that neither belligerent has a right to demand such asylum for his subjects, their property, and his State property from a neutral.[2] But he has, on the other hand, no right either to demand that a neutral refuse such asylum to the enemy. The territorial supremacy of the neutral enables him to

[1] See above, §§ 70 and 71.

[2] The generally recognised usage for a neutral to grant temporary hospitality in his ports to vessels in distress of either belligerent is an exception to be discussed below in § 344.

use his discretion, and either to grant or to refuse asylum. However, the duty of impartiality incumbent upon him must induce a neutral granting asylum to take all such measures as are necessary to prevent his territory from being used as a base of hostile operations.

Now, neutral territory may be an asylum, first, for private enemy property; secondly, for public enemy property, especially war material, cash, and provisions; thirdly, for private subjects of the enemy; fourthly, for enemy land forces; and, fifthly, for enemy naval forces. Details, however, need only be given with regard to asylum to land forces, war material, and naval forces. For with regard to private property and private subjects it only needs mention that private war material brought into neutral territory stands on the same footing as public war material of a belligerent brought there, and, further, that private enemy subjects are safe on neutral territory even if they are claimed by a belligerent for the committal of war crimes.

Only asylum to land forces and war material will be discussed here in §§ 337–341, asylum to naval forces being reserved for a separate discussion in §§ 342–348. As regards asylum to land forces, a distinction must be made between (1) prisoners of war, (2) single fugitive soldiers, and (3) troops or whole armies pursued by the enemy and thereby induced to take refuge on neutral territory.

Neutral Territory and Prisoners of War.

§ 337. Neutral territory is an asylum to prisoners of war of either belligerent in so far as they become free *ipso facto* by their coming into neutral territory. And it matters not in which way they come there, whether they escape from a place of detention and take refuge on neutral territory, or whether they are

brought as prisoners into such territory by enemy troops who themselves take refuge there.[1]

The principle that prisoners of war regain their liberty by coming into neutral territory has been generally recognised for centuries. An illustration occurred in 1558, when several Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada which was wrecked near Calais, and, although the Spanish Ambassador claimed them, France considered them to be freed by the fact of their coming on her territory, and sent them to Constantinople.[2] But has the neutral on whose territory a prisoner has taken refuge the duty to retain such fugitives and thereby prevent them from rejoining the enemy army? In 1870, during the Franco-German War, Belgium, correctly I think, answered the question in the affirmative, and retained a French non-commissioned officer who had been a prisoner in Germany and had escaped into Belgian territory with the intention of rejoining at once the French forces. Whereas this case is controverted,[3] all writers agree that the case is different if escaped prisoners want to remain on the neutral territory. As such refugees may at any subsequent time wish to rejoin their forces, the neutral is by his duty of impartiality obliged to take adequate measures to prevent it. And the same is valid regarding prisoners who have been brought into neutral territory by enemy forces taking refuge there themselves. Although they are thereby free, they must be retained and comply with such measures as the neutral thinks necessary

[1] The case of prisoners on board a belligerent man-of-war which enters a neutral port is different; see below, § 345.

[2] See Hall, § 226, p. 641, note 1.

[3] The question is controverted; see Rolin-Jaequemyns in R.I., III. (1871), p. 556; Bluntschli, § 776; Heilborn, Rechte, pp. 32–34.

to prevent them from rejoining their forces.[1] Again, the case must be mentioned of prisoners being transported through neutral territory with the consent of the neutral. Such prisoners do not become free on entering neutral territory. But there is no doubt that the neutral, by consenting to the transport, violates his duty of impartiality, because such transport is equal to passage of troops through neutral territory. Attention must, lastly, be drawn to the case where enemy soldiers are amongst the wounded whom a belligerent is allowed by a neutral to transport through neutral territory. Such wounded prisoners become free, but they must, according to article 59 of the Hague Regulations, be guarded by the neutral so as to insure their not taking part again in the military operations.

Fugitive Soldiers on Neutral Territory.

§ 338. A neutral can grant asylum to single soldiers of belligerents who take refuge on his territory, although he need not do so and can at once send them back to the place they came from. If he grants such asylum, his duty of impartiality obliges him to disarm the fugitives and to take such measures as are necessary to prevent them from rejoining their forces. But it must be emphasised that it is practically impossible for a neutral to be so watchful as to detect every single fugitive who enters his territory. It will always happen that such fugitives steal into neutral territory and leave it again later on to rejoin their forces without the neutral being responsible. And a neutral must actually be in the position to retain such fugitives to incur responsibility for not doing so. Thus Luxemburg, during the Franco-

[1] This is, again, a moot case. Some writers—see, for instance, Heilborn, Rechte, pp. 51-52—assert that such liberated prisoners cannot be retained by the neutral in case they intend at once to leave the neutral territory.

German War, could not prevent hundreds of French soldiers, who after the capitulation of Metz fled into her territory, from rejoining the French forces, because, according to the condition[1] of her neutralisation, she is not allowed to keep an army, and therefore, in contradistinction to Switzerland and Belgium, was unable to mobilise troops for the purpose of fulfilling her duty of impartiality.

Neutral Territory and Fugitive Troops.

§ 339. On occasions during war large bodies of troops, or even a whole army, are obliged to cross the neutral frontier for the purpose of escaping captivity. A neutral need not permit this, and can repulse them on the spot, but he can also grant asylum. It is, however, obvious that the presence of such troops on neutral territory is a danger for the other party. The duty of impartiality incumbent upon a neutral obliges him, therefore, to disarm such troops at once, and to guard them so as to insure their not again performing military acts during the war against the enemy. Article 57 of the Hague Regulations enacts now :—"A neutral who receives in his territory troops belonging to the belligerent armies shall detain them, if possible, at some distance from the theatre of war. He can keep them in camps, and even confine them in fortresses or localities assigned for the purpose. He shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorisation."

It is usual for troops who are not actually pursued by the enemy, so that they have no time for it, to enter through their commander into a convention with the representative of the neutral concerned, stipulating the conditions upon which they cross the

[1] See above, vol. I. § 100.

frontier and give themselves into the custody of the neutral. Such conventions are valid without needing ratification, provided they contain only such stipulations as do not disagree with International Law and as concern only the requirements of the case. Failing such a convention, article 58 of the Hague Convention enacts now that the neutral must supply the detained troops with food, clothing, and relief required by humanity, the expenses to be paid by the home State at the conclusion of the war.

It must be specially observed that, although the detained troops are not prisoners of war captured by the neutral, they are nevertheless in his custody, and therefore under his disciplinary power, just as prisoners of war are under the disciplinary power of the State which keeps them in captivity. They do not enjoy the exterritoriality—see above, vol. I. § 445—due to armed forces abroad because they are disarmed. As the neutral is required to prevent them from escaping, he must apply stern measures, and he can punish severely every member of the detained force who attempts to frustrate such measures or does not comply with the disciplinary rules regarding order, sanitation, and the like.

The most remarkable instance known in history is the asylum granted during the Franco-German War by Switzerland to a French army of 85,000 men with 10,000 horses crossing the frontier on February 1, 1871.[1] France had, after the conclusion of the war, to pay about eleven million francs for the maintenance of this army in Switzerland during the rest of the war.

[1] See the Convention regarding this asylum between the Swiss General Herzog and the French General Clinchant in Martens, N.R.G., XIX. p. 639.

Neutral Territory and Non-combatant Members of Belligerent Forces.

§ 340. The duty of impartiality incumbent upon a neutral obliges him to detain in the same way as soldiers such non-combatant[1] members of belligerent forces as cross his frontier. He can, however, not retain army surgeons and other non-combatants who are privileged according to article 2 of the Geneva Convention.

Neutral Territory and War Material of Belligerents.

§ 341. It happens during war that war material belonging to one of the belligerents is brought into neutral territory for the purpose of saving it from capture by the enemy. Such war material may be brought by troops crossing the neutral frontier for the purpose of evading captivity, or it may be purposely sent there by order of a commander. Now, a neutral is not at all obliged to admit such material, just as he is not obliged to admit soldiers of belligerents. But if he admits it, his duty of impartiality obliges him to seize and detain it till after the conclusion of peace. War material includes, besides arms, ammunition, provisions, horses, means of military transport such as carts and the like, and everything else that belongs to the equipment of troops. But means of military transport belong to war material only so far as they are the property of a belligerent. If they are hired or requisitioned from private individuals, they cannot be detained by the neutral.

It likewise happens during war that war material originally the property of one of the belligerents but seized and appropriated by the enemy is brought by the latter into neutral territory. Does such material, through coming into neutral territory, become free, and must it be restored to its original owner, or must it be retained by the neutral and after the war

[1] See Heilborn, Rechte, pp. 43–46.

be restored to the belligerent who brought it into the neutral territory? In analogy with prisoners of war who become free through being brought into neutral territory, it is maintained[1] that such war material becomes free and must be restored to its original owner. To this, however, I cannot agree. Since war material becomes through seizure by the enemy his property and remains his property unless the other party re-seizes and thereby re-appropriates it, there is no reason for its falling back into the property of its original owner upon transportation into neutral territory.[2]

V

Neutral Asylum to Naval Forces

Vattel, III. § 132—Hall, § 231—Twiss, II. § 222—Halleck, II. p. 151—Taylor, §§ 635, 636, 640—Wharton, III. § 394—Wheaton, § 434—Bluntschli, §§ 775-776B—Heffter, § 149—Geffcken in Holtzendorff, IV. pp. 665-667, 674—Ullmann, § 164—Bonfils, No. 1463—Rivier, II. p. 405—Calvo, IV. §§ 2669-2684—Fiore, III. Nos. 1576-1581, 1584—Martens, II. § 133—Kleen, II. § 155—Pillet, pp. 305-307—Perels, § 39, p. 231—Testa, pp. 173-187—Dupuis, Nos. 308-314—Ortolan, II. pp. 247-291—Hautefeuille, I. pp. 344-405—Bajer in R.I., 2nd ser., II. (1900), pp. 242-244—Lapradelle in R.G., XI. (1904), p. 531.

Asylum to Naval Forces in Contradistinction to Asylum to Land Forces.

§ 342. Whereas asylum granted to land forces and single members of them by a neutral is conditioned by the obligation of the neutral to disarm such forces and to detain them for the purpose of preventing them from partaking in further military operations, a neutral can grant asylum to men-of-war of belli-

[1] See Hall, § 226.

[2] See Heilborn, Rechte, p. 60. Heilborn (pp. 61-65) also discusses the question whether a neutral can claim a lien over war material brought into his territory for expenses incurred for the maintenance of detained troops belonging to the owner of the war material.

gerents without being obliged to disarm and detain them.[1] The reason is that the sea is considered an international highway, that the ports of all nations serve more or less the interests of international traffic on the sea, and that the conditions of navigation make a certain hospitality of ports to vessels of all nations a necessity. Thus the rules of International Law regarding asylum of neutral ports to men-of-war of belligerents have developed on somewhat different lines from the rules regarding asylum to land forces. But the rule, that the duty of impartiality incumbent upon a neutral must prevent him from allowing belligerents to use his territory as a base of operations of war, is nevertheless valid regarding asylum granted to their men-of-war.

Neutral Asylum to Naval Forces Optional.

§ 343. Although a neutral can grant asylum to belligerent men-of-war in his ports, he has no duty to do so. He can prohibit all belligerent men-of-war from entering all his ports, whether these vessels are pursued by the enemy or desire to enter for other reasons. However, his duty of impartiality must prevent him from denying to the one party what he grants to the other. And he can, therefore, not allow entry to men-of-war of one belligerent without giving the same permission to men-of-war of the other belligerent. Neutrals as a rule admit men-of-war of both parties, but they frequently exclude all men-of-war of both parties from entering certain ports. Thus Austria prohibited during the Crimean War all belligerent men-of-war from entering the port of Cattaro. Thus, further, Great Britain prohibited during the American Civil War the access of all

[1] See, however, below, § 347, concerning the abuse of asylum, which must be prohibited.

belligerent men-of-war to the ports of the Bahama Islands, the case of stress of weather excepted.

That, although a neutral is not prevented from granting asylum to belligerent men-of-war, they can be allowed to remain for a short time only in neutral ports will be remembered. For it was stated above in § 333 (6) that his duty of impartiality must prevent a neutral from allowing belligerent men-of-war to be stationed in neutral ports.

Asylum to Naval Forces in Distress.

§ 344. To the rule that a neutral need not admit men-of-war of the belligerents to neutral ports there is no exception in strict law. However, there is an international usage that belligerent men-of-war in distress should never be prevented from making for the nearest port. In accordance with this usage vessels in distress have always been allowed entry even to such neutral ports as were totally closed to belligerent men-of-war. There are even instances known of belligerent men-of-war in distress having asked for and been granted asylum by the enemy in an enemy port.[1]

Exterritoriality of Men-of-War during Asylum.

§ 345. The exterritoriality, which according to a universally recognised rule of International Law men-of-war must enjoy [2] in foreign ports, obtains even in time of war during their stay in neutral ports. Therefore, prisoners of war on board do not become free by coming into the neutral territory [3] as long as they are not on shore, nor do prizes brought into neutral ports by belligerents. On the other hand, belligerent men-of-war are expected to comply with all orders which the neutral makes for the purpose of preventing them from making his ports the base of their operations of war, as, for instance, with the order

[1] See above, § 189. [2] See above, vol. I. § 450.
[3] See above, § 337.

not to leave the ports at the same time as vessels of the other belligerent. And if they do not comply voluntarily, they can be made to do it through application of force, for a neutral has the duty to prevent by all means at hand the abuse of the asylum granted.

In case—see below, § 347 (3 and 4)—a vessel is granted an asylum for the whole time of the war, and is, therefore, dismantled, she loses the character of a man-of-war, no longer enjoys the privilege of exterritoriality—see above, vol. I. § 450—due to men-of-war in foreign waters, and prisoners on board become free, although they must be detained by the neutral concerned.

Facilities to Men-of-War during Asylum.

§ 346. A belligerent man-of-war, to which asylum is granted in a neutral port, is not only not disarmed and detained, but facilities may even be rendered to her as regards slight repairs, and the supply of provisions and coal. However, a neutral may only allow small repairs of the vessel herself and not of her armaments;[1] for he would render assistance to one of the belligerents, to the detriment of the other, if he were to allow the damaged armaments of a belligerent man-of-war to be repaired in a neutral port. And, further, a neutral may only allow such an amount of provisions and coal to a belligerent man-of-war in neutral ports as is necessary for her safe navigation to the nearest port of her home State;[2] for, if he did otherwise, he would allow the belligerent to use the neutral ports as a base for operations of war. And, lastly, a neutral may allow a belligerent man-of-war in neutral ports to enrol only so small a number of sailors as is necessary to navigate her safely to the nearest port of her home State.[3]

[1] See above, § 333 (5), and below, § 347 (3).

[2] See above, § 333 (4).

[3] See above, §§ 330 and 333 (3).

Abuse of Asylum to be prohibited.

§ 347. It would be easy for belligerent men-of-war to which asylum is granted in neutral ports to abuse it if the neutrals were not required to prohibit such abuse.

(1) A belligerent man-of-war may first abuse asylum by ascertaining whether and what kind of enemy vessels are in the same neutral port, accompanying them when they leave, and attacking them immediately they reach the Open Sea. To prevent such abuse, several neutral States in the eighteenth century made an arrangement that, if belligerent men-of-war or privateers met with enemy vessels in the same neutral port, they were not to be allowed to leave together, but an interval of twenty-four hours must elapse between the sailing of the vessels. During the nineteenth century the so-called twenty-four hours' rule has been enforced by the majority of States. As International Law stands at present, and as the duty of impartiality incumbent upon neutrals is now looked upon, a neutral would certainly be considered to have violated this duty if he regularly allowed the simultaneous sailing of belligerent men-of-war and enemy vessels from his ports, with the consequence that the latter are captured by the former as soon as they reach the Open Sea. On the other hand, however, it cannot be asserted that the twenty-four hours' rule is a rule of International Law, and that every neutral has to enforce it. For nothing prevents a neutral from making other arrangements for the purpose of avoiding an abuse of asylum on the part of belligerent men-of-war; for instance, making the commanders promise not to attack any enemy vessels starting simultaneously with themselves.[1]

[1] See above, § 333 (2), and Hall, § 231, p. 651.

(2) Asylum may, secondly, be abused for the purpose of waiting for other vessels of the same fleet, of wintering in a port, and the like. It seems to be beyond doubt that neutrals must prohibit this abuse by ordering such belligerent men-of-war to leave the neutral ports. Several maritime States, following the example started by Great Britain in 1862,[1] adopted the rule not to allow a belligerent man-of-war to stay in their neutral ports for longer than twenty-four hours,[2] except in the case of stress of weather and the like. Other States, such as France, do not object to a more prolonged stay of belligerent men-of-war in their ports, but they ought certainly not to allow them to abuse the asylum.

(3) Asylum may, thirdly, be abused for the purpose of repairing a belligerent man-of-war which has become unseaworthy. Although—as was stated above in § 346—small repairs are allowed, a neutral would violate his duty of impartiality by allowing repairs making good the unseaworthiness of a belligerent man-of-war. During the Russo-Japanese War this was generally recognised, and the Russian men-of-war "Askold" and "Grossovoi" in Shanghai, the "Diana" in Saigon, and the "Lena" in San Francisco had therefore to be disarmed and detained. The crews of these vessels had likewise to be detained for the time of the war.

(4) Asylum may, lastly, be abused for the purpose of escaping from attack and capture. Neutral territorial waters are in fact an asylum for men-of-war which are pursued by the enemy, but, since nowadays a right of pursuit into neutral waters, as asserted by Bynkershoek,[3] is no longer recognised,

[1] See Hall, § 231, p. 653.
[2] See above, § 333 (6).
[3] Quaest. jur. publ. I. c. 8. See also above, § 288, p. 306.

it would be an abuse of asylum if the escaped vessel could make a prolonged stay in the neutral waters. A neutral who would allow such abuse of asylum would violate his duty of impartiality, for he would assist one of the belligerents to the disadvantage of the other.[1] Therefore, when after the battle off Port Arthur in August 1904 the Russian battleship "Cesarewitch," the cruiser "Novik," and three destroyers escaped, and took refuge in the German port of Tsing-Tau in Kiao-Chau, the "Novik," which was uninjured, had to leave the port after a few hours,[2] whereas the other vessels, which were too damaged to leave the port, were disarmed and, together with their crews, detained till the conclusion of peace. And when, at the end of May 1905, after the battle of Tsu Shima, three injured Russian men-of-war, the "Aurora," "Oleg," and "Jemchug," escaped into the harbour of Manila, the United States of America ordered them to be disarmed and, together with their crews, to be detained during the war.

[1] It was only during the Russo-Japanese War in 1904 that this was generally recognised. Up to that event it was still a controverted question whether a neutral is obliged either to dismiss or to disarm and detain such men-of-war as had fled into his ports for the purpose of escaping attack and capture. See Hall, § 231, p. 651, and Perels, § 39, p. 213, in contradistinction to Fiore, III. No. 1578. The "Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers," adopted by the Institute of International Law in 1898 at its meeting at the Hague—see Annuaire, XVII. (1898), p. 273—answers (article 42) the question in the affirmative.

[2] This case marks the difference between the duties of neutrals as regards asylum to land and naval forces. Whereas land forces crossing neutral frontiers must either be at once repulsed or retained, men-of-war can be granted the right to stay for some limited time within neutral harbours and to leave afterwards unhindered; see above, § 342. The supply of a small quantity of coal to the "Novik" in Tsing-Tau was criticised by writers in the Press, but unjustly. For—see above, § 346—a neutral can allow a belligerent man-of-war in his port to take in so much coal as is necessary to navigate her to her nearest home port.

Neutral Men-of-war as an Asylum.

§ 348. It happens during war that neutral men-of-war pick up and save from drowning the soldiers and sailors of belligerent men-of-war sunk by the enemy, or that they take belligerent marines on board for other reasons. Such neutral men-of-war being an asylum for the r escued marines, the question has arisen whether such rescued marines must be given up to the enemy, or must be retained during the war, or can be brought to their home country. In analogy with the case where a neutral admits soldiers or war material of the belligerents into his territory,[1] the rule ought to be that such rescued marines must be detained during the war. Two cases are on record which illustrate this matter.

(1) At the beginning of the Chino-Japanese War, on July 25, 1894, after the Japanese cruiser "Naniwa" had sunk the British ship "Kowching," which served as transport carrying Chinese troops,[2] forty-five Chinese soldiers who clung to the mast of the sinking ship were rescued by the French gunboat "Lion" and brought to the Korean harbour of Chemulpo. Hundreds of others saved themselves on some islands near the spot where the incident occurred, and 120 of these were taken in by the German man-of-war "Iltis" and brought back to the Chinese port of Tientsin.[3]

(2) At the beginning of the Russo-Japanese War, on February 9, 1904, after the Russian cruisers "Variag" and "Korietz" had accepted the challenge[4] of a Japanese fleet, fought a battle outside the harbour of Chemulpo, and returned, crowded with wounded, to Chemulpo, the British cruiser "Talbot"

[1] See above, §§ 338–341.
[2] See above, § 88.
[3] See Takahashi, Cases on International Law during the Chino-Japanese War (1899), pp. 36 and 51.
[4] See above, § 320 (1).

the American "Vicksburg," the French "Pascal," and the Italian "Elba" received large numbers of the crews of the disabled Russian cruisers. The Japanese demanded that the neutral ships should give up the rescued men as prisoners of war, but the neutral commanders demurred, and an arrangement was made according to which the rescued men were handed over to the Russians under the condition that they should not take part in hostilities during the war.[1]

VI

Supplies and Loans to Belligerents

Vattel, III. § 110—Hall, §§ 216-217—Lawrence, § 254—Phillimore, III. § 151—Twiss, II. § 227—Halleck, II. p. 163- Taylor, §§ 622-625—Walker, § 67—Wharton, III. §§ 390-391—Bluntschli, §§ 765-768—Heffter, § 148—Geffcken in Holtzendorff, IV. pp. 687-700—Ullmann, §§ 164-165—Bonfils, Nos. 1471-1474—Rivier, II. pp. 385-411—Calvo, IV. §§ 2624-2630—Fiore, III. Nos. 1559-1563—Martens, II. § 134—Kleen, I. §§ 66-69, 96-97—Mérignhac, pp. 360-364—Pillet, pp. 289-293—Dupuis, Nos. 317-319.

Supply on the part of Neutrals.

§ 349. The duty of impartiality must prevent a neutral from supplying belligerents with arms, ammunition, vessels,[2] and military provisions. And it matters not whether such supply takes place for money or gratuitously. A neutral who sells arms and ammunition to a belligerent at a profit violates his duty of impartiality as well as another who transfers such arms and ammunition to a belligerent as a present. This is generally recognised in theory and practice as far as direct transactions regarding such supply between belligerents and neutrals are

[1] See Lawrence, War, pp. 63-75.

[2] See above, § 321, concerning the sale of vessels by German steam-ship companies to Russia during the Russo-Japanese War.

concerned. Different, however, is the case where a neutral does not directly and knowingly deal with a belligerent, although he may, or ought to, be aware that indirectly he is supplying a belligerent. Different States have during neutrality taken up a different attitude regarding this case. Thus in 1825, during the War of Independence which the Spanish South American Colonies waged against their mother country, the Swedish Government sold three old men-of-war, the "Försigtigheten," "Euridice," and "Camille" to two merchants, who on their part sold them to English merchants, representatives of the Government of the Mexican insurgents. When Spain complained, Sweden rescinded the contract.[1] Further, the British Government in 1863, during the American Civil War, after selling an old gunboat, the "Victor," to a private purchaser and subsequently finding that the agents of the Confederate States had got hold of her, gave the order that during the war no more Government ships should be sold.[2] On the other hand, the Government of the United States of America, in pursuance of an Act passed by Congress in 1868 for the sale of arms which the end of the Civil War had rendered superfluous, sold in 1870, notwithstanding the Franco-German War, thousands of arms and other war material which were shipped to France.[3]

Supply on the part of Subjects of Neutrals.

§ 350. In contradistinction to supply to belligerents by neutrals, such supply by subjects of neutrals is lawful, and neutrals are, therefore, not obliged according to their duty of impartiality to prevent such supply. Consequently, when in August 1870, during the Franco-German War, Germany

[1] See Martens, Causes Célèbres, V. pp. 229–254.

[2] See Lawrence, § 254.

[3] See Wharton, III. § 391.

lodged complaints with the British Government for not prohibiting its subjects from supplying arms and ammunition to the French Government, Great Britain correctly replied that she was by International Law not under the obligation to prevent her subjects from committing such acts. Of course, such neutral as is anxious to avoid all controversy and friction may by his Municipal Law order his subjects to abstain from such acts, as for instance Switzerland and Belgium did during the Franco-German War. But such injunctions arise from political prudence, and not from any obligation imposed by International Law. The endeavour to make a distinction between supply in single cases and on a small scale on the one hand, and, on the other, supply on a large scale, and to consider only the former lawful,[1] has neither in theory nor in practice found recognition. As International Law stands, belligerents can make use of visit, search, and seizure to protect themselves against conveyance of contraband by sea to the enemy by subjects of neutrals. But as far as their neutral home State is concerned, such subjects can, at the risk of having their property seized during such conveyance, supply either belligerent with any amount of arms, ammunition, coals, provisions, and even with armed ships,[2] provided always that they deal with the belligerents in the ordinary way of commerce. The case is different if there is no ordinary commerce with a belligerent Government and if subjects of neutrals supply directly a belligerent army or navy, or parts of them. If, for instance, a belligerent fleet is cruising outside the maritime belt of a neutral,

[1] See Bluntschli, § 766.
[2] See above, § 334, and below, § 397.

the latter must prevent vessels of his subjects from bringing coal, arms, ammunition, and provisions to that fleet, for otherwise he would allow the belligerent to make use of neutral resources for naval operations.[1] But he need not prevent vessels of his subjects from bringing coal, arms, ammunition, and provisions to belligerent ports, although the supply is destined for the navy and the army of the belligerent. He need not prevent belligerent merchantmen from coming into his ports and carrying arms and the like bought from his subjects over to the ports of their home State. And he need not prevent vessels of his subjects from following a belligerent fleet and supplying it *en route*[2] with coal, ammunition, provisions, and the like, provided such supply does not take place in the neutral maritime belt.

There is no doubt that, as the law stands at present, neutrals need not prevent their subjects from supplying belligerents with arms and ammunition. Yet there is, on the other hand, no doubt either that such supply is apt to prolong a war which otherwise would come to an end at an earlier date. But it will take a long time, if ever, before it will be made a duty for neutrals to prevent such supply as far as is in their power, and to punish such of their subjects as engage in it. The profit derived from such supply being enormous, the members of the Family of Nations are not inclined to cripple the trade of their subjects by preventing it. And belligerents want to have the opportunity of replenishing with arms and ammunition if they run short of them during war. The question is merely one of the standard of public morality.[3] If this standard

[1] See above, § 333 (4). [2] See above, § 311, p. 331, note 1.
[3] See above, vol. I. § 51 (5), p. 75.

rises, and it becomes the conviction of the world at large that supply of arms and ammunition by subjects of neutrals is apt to lengthen wars, the rule will appear that neutrals must prevent such supply.

Loans and Subsidies on the part of Neutrals.

§ 351. His duty of impartiality must prevent a neutral from granting a loan to either belligerent. Vattel's (III. § 110) distinction between whether such loans are granted on interest or not, and his assertion that loans on the part of neutrals are lawful if they are granted on interest with the pure intention of making money, have not found favour with other writers. Nor do I know any instance of such loan on interest having occurred during the nineteenth century.

What is valid regarding a loan is all the more valid regarding subsidies in money granted to a belligerent on the part of a neutral. Through the granting of subsidies a neutral becomes the ally of the belligerent in a similar way as by furnishing him with a number of troops.[1]

Loans and Subsidies on the part of Subjects of Neutrals.

§ 352. It is a moot point in the theory of International Law whether a neutral is obliged by his duty of impartiality to prevent his subjects from granting subsidies and loans to belligerents for the purpose of enabling them to continue the war. Several writers[2] maintain either that a neutral is obliged to prevent such loans and subsidies altogether, or at least that

[1] See above, §§ 305, 306, 321.

[2] See Phillimore, III. § 151; Bluntschli, § 768; Heffter, § 148; Kleen, I. § 68. The case of De Wütz *v.* Hendricks (9 Moore, 586) quoted by Phillimore in support of his assertion that neutrals must prevent their subjects from subscribing for a loan for belligerents, is not decisive, for Lord Chief Justice Best only declared "that it was contrary to the Law of Nations for persons residing in this country to enter into any agreements to raise money by way of a loan for the purpose of *supporting subjects of a foreign State in arms against a Government in alliance with our own.*

he must prohibit a public subscription on neutral territory for such loans and subsidies. On the other hand, the number of writers is constantly growing who maintain that, since money is just as much an article of commerce as goods, a neutral is in no wise obliged to prevent on his territory public subscription on the part of his subjects for loans to the belligerents. In contradistinction to the theory of International Law, the practice of the States has beyond doubt established the fact that neutrals need not prevent the subscription for loans to belligerents on their territory. Thus in 1854, during the Crimean War, France in vain protested against a Russian loan being brought out in Amsterdam, Berlin, and Hamburg. In 1870, during the Franco-German War, a French loan was brought out in London. In 1877, during the Russo-Turkish War, no neutral prevented his subjects from subscribing for the Russian loan. Again, in 1904, during the Russo-Japanese War, Japanese loans came out in London and Berlin, and Russian loans in Paris and Berlin.

But matters differ in regard to subsidies to belligerents on the part of subjects of neutrals. A neutral is indeed not obliged to prevent individual subjects from granting subsidies to belligerents, just as he is not obliged to prevent them from enlisting with either belligerent. But if he were to allow on his territory a public appeal for subscriptions for such subsidy, he would certainly violate his duty of impartiality; for loans are a matter of commerce, subsidies are not. It must, however, be emphasised that public appeals for subscriptions of money for charitable purposes in favour of the wounded, the prisoners, and the like, need not be prevented, even

if they are only made in favour of one of the belligerents.

The distinction between loans and subsidies is certainly correct as the law stands at present. But there is no doubt that the fact of the belligerents having the opportunity of getting loans from subjects of neutrals is apt to lengthen wars. The Russo-Japanese War, for instance, would have come to an end much sooner if neither belligerent could have borrowed money from subjects of neutrals. Therefore, what has been said above in § 350 with regard to the supply of arms and ammunition on the part of subjects of neutrals applies likewise to loans: they will no longer be considered lawful when the standard of public morality rises.

VII

Services to Belligerents

Ullmann, § 165—Rivier, II. pp. 388–391—Calvo, IV. §§ 2640–2641—Martens, II. § 134—Perels, § 43—Kleen, I. §§ 103–108—Lawrence, War, pp. 83–92, 218–220—Scholz, "Drahtlose Telegraphie und Neutralität" (1905) *passim*, and "Krieg und Seekabel" (1904), pp. 122–133—Kebedgy, in R.I., 2nd ser. IV (1904), pp. 445–451.

Pilotage.

§ 353. Since pilots are in the service of riparian States, neutrals are obliged by their duty of impartiality to prevent their pilots from piloting belligerent men-of-war and belligerent transport vessels. This does not, however, apply to piloting such vessels into neutral ports in case asylum is granted them, and through the maritime belt in case their passage is not prohibited, but only to piloting on the Open Sea, with the further excep-

tion of vessels in distress for the purpose of saving them from being lost. Accordingly, Great Britain prohibited her pilots, during the Franco-German War in 1870, from conducting German and French men-of-war outside the maritime belt, the case of vessels in distress excepted.

Transport on the part of Neutrals.

§ 354. It is generally recognised that the duty of impartiality incumbent upon a neutral obliges him to prevent his men-of-war and other public vessels from rendering transport services to either belligerent. Therefore, such vessels must carry neither soldiers nor sailors belonging to belligerent forces, nor their prisoners of war, nor ammunition, military or naval provisions, nor despatches. The question how far such vessels are prevented from carrying enemy subjects other than members of the forces depends upon the question whether by carrying those individuals they render such service to one of the belligerents as is detrimental to the other. Thus, when the Dutch Government in 1901, during the South African War, intended to offer a man-of-war to President Kruger for the purpose of conveying him to Europe, they made sure in advance that Great Britain did not object.

Transport on the part of Neutral Merchantmen.

§ 355. Just as a neutral is not obliged to prevent his merchantmen from carrying contraband, so he is not obliged to prevent them from rendering services to belligerents by carrying in the way of trade enemy troops, and the like, and enemy despatches. Neutral merchantmen rendering such services to belligerents do this at their own risk, since such services are analogous to carrying contraband, for which belligerents can punish the merchantmen by capturing them,[1] but for which the neutral

[1] See below, §§ 407–413.

State under whose flag such merchantmen sail has to bear no responsibility whatever.

Information regarding Military and Naval Operations.

§ 356. Distinction must be made between information on the part of vessels, by couriers, by telegraph or telephone, and by wireless telegraphy.

(1) It is obvious that the duty of impartiality incumbent upon a neutral obliges him to prevent his men-of-war from giving any information to a belligerent concerning naval operations of the other party. But a neutral bears no responsibility whatever for private vessels sailing under his flag which give such information. Such vessels run, however, the risk of being captured and confiscated, and their crews may eventually be punished as war criminals for espionage.

(2) It is likewise obvious that his duty of impartiality must prevent a neutral from giving information concerning the war to a belligerent through his diplomatic envoys, couriers, and the like. But the question has been raised whether a neutral is obliged to prevent couriers[1] carrying despatches from a belligerent over his neutral territory. I believe the answer must be in the negative, at least as far as those couriers in the service of diplomatic envoys and such agents are concerned who carry despatches from a State to its head or to diplomatic envoys abroad. Since they enjoy—as stated above, vol. I. §§ 405 and 457—inviolability for their persons and official papers, a neutral cannot interfere and find out whether these individuals carry information to the disadvantage of the enemy.

(3) It is a moot point whether a neutral is obliged by his duty of impartiality to prevent belligerents from making use of telegraphs, submarine cables,

[1] See Calvo, IV. § 2640.

and telephones on his territory.[1] As State telegrams are as a rule transmitted in cipher, there is no possibility of controlling them, and it will hardly be possible to maintain that a neutral ought not to admit State telegrams in cipher despatched by belligerents. Messages sent by telephone are controllable, and so are telegrams in ordinary language. But it cannot be said that there is as yet a generally recognised duty of neutrals to control telephone messages and telegrams in ordinary language so as to be able to prevent information to belligerents.[2]

The case is different when a belligerent intends to arrange the transmitting of messages through a submarine cable purposely laid over neutral territory, or through telegraph and telephone wires purposely erected on neutral territory. This would seem to be an abuse of neutral territory, and the neutral must prevent it. Accordingly, when in 1870, during the Franco-German War, France intended to lay a telegraph cable from Dunkirk to the North of France, the cable to go across the Channel to England and from there back to France, Great Britain refused her consent on account of her neutrality. And again in 1898, during war between Spain and the United States of America, when the latter intended to land at Hong Kong a cable proposed to be laid from Manila, Great Britain refused her consent.[3]

(4) During the Russo-Japanese War, in 1904, the question arose whether a neutral can allow his territory to be used for the purpose of wireless

[1] See Scholz, *l.c.*, pp. 7–11, and Calvo, IV. §§ 2640–2641.

[2] See, however, the rule 5, adopted by the Institute of International Law—see above, § 214—concerning submarine telegraph cables in time of war:—"Il est entendu que la liberté de l'état neutre de transmettre des dépêches n'implique pas la faculté d'en user ou d'en permettre l'usage manifestement pour prêter assistance à l'un des belligérants."

[3] See Lawrence, War, p. 219.

telegraphy in the interest or the service of belligerents, for during the siege of Port Arthur the Russians installed an apparatus for wireless telegraphy in Chifu and communicated thereby with the besieged.[1] The opinion would seem to be general that a neutral must prevent such an abuse of his territory.

On the other hand, a neutral is certainly not obliged to prevent his subjects from giving information to belligerents by way of wireless telegraphy, an apparatus being installed on a neutral merchantman. Such individuals run, however, the risk of being punished as spies, provided they act clandestinely or under false pretences,[2] and the vessel concerned runs the risk of being captured and confiscated.

It must be specially observed that newspaper correspondents making use of wireless telegraphy from on board of neutral merchantmen for the purpose of sending news to their papers,[3] cannot be treated as spies, and the merchantmen concerned cannot be confiscated, although belligerents need by no means allow[4] the presence of such vessels at the theatre of war. Of course, an individual may be at the same time a correspondent for a neutral paper and a spy, and he may then be punished.

[1] See Lawrence, War, p. 218.
[2] See above, § 160.
[3] See Lawrence, War, pp. 84–88.
[4] Thus during the Russo-Japanese War the "Haimun," a vessel fitted up with a wireless telegraphy apparatus for the service of the "Times," was ordered away by the Japanese.

UNIVERSITY OF CALIFORNIA

VIII

Violation of Neutrality

Hall, §§ 227-229—Lawrence, §§ 252 and 258—Phillimore, III. §§ 151A-151B—Taylor, §§ 630 and 642—Wharton, III. §§ 402, 402A—Wheaton, §§ 429-433—Bluntschli, §§ 778-782—Heffter, § 146—Geffcken in Holtzendorff, IV. pp. 667-676, 700-709—Ullmann, § 164—Bonfils, No. 1476—Rivier, II. pp. 394-395—Calvo, IV. §§ 2654-2666—Fiore, III. Nos. 1567-1570—Martens, II. § 138—Kleen, I. § 25—Dupuis, Nos. 332-337.

Violation of Neutrality in the narrower and in the wider sense of the Term.

§ 357. Many writers who speak of violation of neutrality treat under this head only of violations of the duty of impartiality incumbent upon neutrals. And indeed such violations only are meant, if one speaks of violation of neutrality in the narrower sense of the term. However, it is necessary for obvious reasons to discuss not only violations of the duty of impartiality of neutrals, but violations of all duties deriving from neutrality, whether they are incumbent upon neutrals or upon belligerents. In the wider sense of the term violation of neutrality comprises, therefore, every performance or omission of an act contrary to the duty of a neutral towards either belligerent as well as contrary to the duty of either belligerent towards a neutral. Everywhere in this treatise the term is used in its wider sense.

Violation in contradistinction to End of Neutrality.

§ 358. Violation of neutrality must not be confounded with the ending of neutrality,[1] for neither a violation on the part of a neutral[2] nor a violation on the part of a belligerent brings *ipso facto* neutrality to an end. If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent

[1] See above, § 312.

[2] But this is almost everywhere asserted, as the distinction between the violation of the duty of impartiality incumbent upon neutrals on the one hand, and, on the other, the ending of neutrality, is usually not made.

in spite of a violation of neutrality. It must be emphasised that a violation of neutrality contains nothing more than a breach of a duty deriving from the condition of neutrality. This applies not only to violations of neutrality by negligence, but also to those by intention. Even if the worst comes to the worst and the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party. For there is no violation of neutrality so great as to oblige the offended party to make war in answer to it, such party having always the choice whether it will keep up the condition of neutrality or not.

But this applies only to mere violations of neutrality, and not to hostilities. The latter are acts of war and bring neutrality to an end; they have been characterised in contradistinction to mere violations above in § 320.

Consequences of Violations of Neutrality.

§ 359. Violations of neutrality, whether committed by a neutral against a belligerent or by a belligerent against a neutral, are international delinquencies.[1] They may at once be repulsed, the offended party can require the offender to make reparation, and, if this is refused, it can take such measures as it thinks adequate to exact the necessary reparation.[2] If the violation is trivial, the offended State will often overlook it, or merely complain. If, on the other hand, the violation is very substantial and grave, the offended State will perhaps at once declare that it considers itself at war with the offender. In such case it is not the violation of neutrality which brings neutrality to an end, but the declaration of the

[1] See above, vol. I. § 151.

[2] See above, vol. I. § 156.

offended State that it considers the violation of so grave a character as to oblige it to regard itself as at war with the offender. That a violation of neutrality can only, like any other international delinquency, be committed by malice or culpable negligence,[1] and that it may be committed through a State's refusing to comply with the consequences of its "vicarious" responsibility for acts of its agents or subjects,[2] is a matter of course. Thus, if a belligerent fleet attacks enemy vessels in neutral territorial waters without an order from its Government, the latter bears "vicarious" responsibility for this violation of neutral territory on the part of its fleet. This "vicarious" responsibility turns into "original" responsibility, for a case of violation of neutrality and an international delinquency arise, if the Government concerned refuses to disown the act of its fleet and to make the necessary reparation. And the analogous is valid if an agent of a neutral State without an order of his Government commits such an act as would constitute a violation of neutrality in case it were ordered by the Government; for instance, if the head of a province of a neutral, without thereto being authorised by his Government, allows forces of a belligerent to march through this neutral territory.

Neutrals not to acquiesce in Violations of Neutrality committed by a Belligerent.

§ 360. It is totally within the discretion of a belligerent whether he will acquiesce in a violation of neutrality committed by a neutral in favour of the other belligerent. On the other hand, however, a neutral cannot exercise the same discretion regarding a violation of neutrality committed by one belligerent and detrimental to the other party. His duty of impartiality rather obliges him in the first instance to

[1] See above, vol. I. § 154. [2] See above, vol. I. § 150.

prevent, as far as is in his power, the belligerent concerned from committing such violation; for instance, to repulse an attack of men-of-war of a belligerent on enemy vessels in neutral ports. And in case he could not prevent and repulse a violation of his neutrality, the same duty obliges him to exact due reparation from the offender.[1] For otherwise he would favour the one party to the detriment of the other. If a neutral neglects this obligation, he is thereby committing a violation of neutrality on his part for which he may be made responsible by such belligerent as has suffered through the violation of neutrality committed by the other belligerent and acquiesced in by the neutral. For instance, if belligerent men-of-war seize enemy vessels in ports of a neutral, and if the neutral, who could not or did not prevent this, exacts no reparation from the belligerent concerned, the other party can make the neutral responsible for the losses sustained.

Case of the "General Armstrong."

§ 361. Some writers[2] maintain that a neutral is freed from responsibility for a violation of neutrality through a belligerent attacking enemy forces in neutral territory, in case the attacked forces, instead of trusting for protection or redress to the neutral, defend themselves against the attack. This rule is

[1] This duty is nowadays generally recognised, but before the nineteenth century it did not exist, although the rule was well recognised that belligerents must not commit hostilities on neutral territory, and in especial in neutral ports and waters. That in spite of its recognition this rule was in the eighteenth century frequently not obeyed by commanders of belligerent fleets, can be illustrated by many cases. Thus, for instance, in 1793, the French frigate "Modeste" was captured in the harbour of Genoa by two British men-of-war (see Hall, § 220). And in 1801, during war against Sweden, a British frigate captured the "Freden" and three other Swedish vessels in the Norwegian harbour of Oster-Risoer (see Ortolan, II. pp. 413–418.)

[2] See, for instance, Hall, § 228, and Geffcken in Holtzendorff, IV. p. 701.

adopted from the arbitral award in the case of the "General Armstrong." In 1814, during war between Great Britain and the United States of America, the American privateer "General Armstrong," lying in the harbour of Fayal, an island belonging to the Portuguese Azores, defended herself against an attack of an English squadron, but was nevertheless captured. The United States claimed damages from Portugal because the privateer was captured in a neutral Portuguese port. Negotiations went on for many years, and the parties finally agreed in 1851 upon arbitration to be given by Louis Napoleon, then President of the French Republic. In 1852 Napoleon gave his award in favour of Portugal, maintaining that, although the attack on the privateer in neutral waters comprised a violation of neutrality, Portugal could not be made responsible, on account of the fact that the attacked privateer chose to defend herself instead of demanding protection from the Portuguese authorities.[1] It is, however, not at all certain that the rule laid down in this award will find general recognition in theory and practice.[2]

Mode of exacting Reparation from Belligerents for Violations of Neutrality.

§ 362. It is obvious that the duty of a neutral not to acquiesce in violations of neutrality committed by one belligerent to the detriment of the other obliges him to repair, so far as he can, the result of such wrongful acts. Thus, he must liberate a prize taken in his neutral waters, or prisoners made on his territory, and the like. In so far, however, as he cannot, or not sufficiently, undo the wrong done, he must exact

[1] See Calvo, IV. § 2662, and Dana's note 208 in Wheaton, § 429.

[2] The case of the "Reshitelni," which occurred in 1904, during the Russo-Japanese War, and is somewhat similar to that of the "General Armstrong," is discussed above in § 320 (2). That no violation of neutrality took place in the case of the "Variag" and "Korietz," is shown above in § 320 (1).

reparation from the offender. Now, no general rule can be laid down regarding the mode of exacting such reparation, since everything depends upon the merits of the individual case. Only as regards capture of enemy vessels in neutral waters a practice has grown up, which must be considered binding, and according to which the neutral must claim the prize, and eventually damages, from the belligerent concerned, and must restore her to the other party. Thus in 1800, during war between Great Britain and the Netherlands, Prussia claimed before the British Prize Court the "Twee Gebroeders,"[1] a Dutch vessel captured by the British cruiser "L'Espiègle" in the neutral maritime belt of Prussia. Sir William Scott ordered restoration of the vessel, yet he refused costs and damages, because the captor had not intentionally violated Prussian neutrality but only by mistake and misapprehension. Thus again, in 1805, during war between Great Britain and Spain, the United States claimed before the British Prize Court the "Anna,"[2] a Spanish vessel captured by the English privateer "Minerva" within their neutral maritime belt. Thus, further, in 1864, during the American Civil War, when the Confederate cruiser "Florida" was captured by the Federal cruiser "Wachuset" in the neutral Brazilian port of Bahia, Brazil claimed the prize. As the latter had sunk while at anchor in Hampton Roads, she could not be restored, but the United States disowned the violation of neutrality committed by her cruiser by court-martialling the commander; further, by dismissing her Consul at Bahia for having advised the capture; and, finally, by sending a man-of-war to the spot where the violation of neutrality had taken place for the special

[1] 3 Rob. 162. [2] 5 Rob. 373. See above, vol. I. § 234.

purpose of delivering a solemn salute to the Brazilian flag.[1]

Negligence on the part of Neutrals.

§ 363. Apart from intentional violations of neutrality, a neutral can be made responsible only for such acts favouring or damaging a belligerent as he could have prevented with due diligence, and has been culpably negligent in his omission to prevent. It is by no means the obligation of a neutral to prevent such acts under all circumstances and conditions. This is in fact impossible, and it becomes all the more impossible the larger a neutral State and its boundary lines are. As long as a neutral exercises due diligence for the purpose of preventing such acts, he is not responsible in case they are nevertheless performed. However, the term *due diligence* has become controversial through the definition proffered by the United States of America in interpreting the Three Rules of Washington, and through the Geneva Court of Arbitration adopting such interpretation.[2] According to this interpretation the *due diligence* of a neutral must be in proportion to the risks to which either belligerent may be exposed from a failure to fulfil the obligations of neutrality on his part. If this interpretation were generally recognised, oppressive obligations would be incumbent upon the neutrals. However, the fact is that this interpretation is neither in theory nor in practice generally recognised. *Due diligence* in International Law can have no other meaning than what it has in Municipal Law. It means *such diligence as can reasonably be expected if all the circumstances and conditions of the case are taken into consideration.*

[1] See Wharton, I. § 27.

[2] See above, § 335.

IX

Right of Angary

Hall, § 278—Lawrence, § 252—Phillimore, III. § 29—Halleck, I. p. 485—Taylor, § 641—Walker, § 69—Bluntschli, § 795A—Heffter, § 150—Bulmerincq in Holtzendorff, IV. pp. 98–103—Geffcken in Holtzendorff, IV. pp. 771–773—Bonfils, No. 1440—Rivier, II. pp. 327–329—Kleen, II. §§ 165 and 230—Holland, War, No. 24—Perels, § 40—Hautefeuille, III. pp. 416–426.

The Obsolete Right of Angary.

§ 364. Under the term *jus angariae*[1] many writers on International Law place the right, often claimed and practised in former times, of a belligerent deficient in vessels to lay an *embargo* on and seize neutral merchantmen in his harbours, and to compel them and their crews to transport troops, ammunition, and provisions to certain places on payment of freight in advance.[2] This practice arose in the Middle Ages, and was made much use of by Louis XIV. of France. To save the vessels of their subjects from seizure under the right of angary, States began in the seventeenth century to conclude treaties by which they renounced such right with regard to each other's vessels. Thereby the right came into disuse during the eighteenth century. Many writers[3] assert, nevertheless, that it is not obsolete, and might be exercised even to-day. But I doubt whether the Powers would concede to one another the exercise of such a right. The fact that no case happened in the nineteenth century and that International Law with regard to rights and duties of neutrals has become much more developed

[1] The term *angaria*, which in medieval Latin means *post-station*, is a derivation from the Greek term ἄγγαρος for messenger. *Jus angariae* would therefore literally mean a right of transport.

[2] See above, §§ 40 and 102.

[3] See, for instance, Phillimore III. § 29; Calvo, III. § 1277; Heffter, § 150; Perels, § 40.

during the eighteenth and nineteenth centuries, would seem to justify the opinion that such angary is now obsolete.[1]

The Modern Right of Angary.

§ 365. In contradistinction to this obsolete right to compel neutral ships and their crews to render certain services, the modern right of angary consists in the right of belligerents to make use of, or destroy in case of necessity, for the purpose of offence and defence, neutral property on their own or on enemy territory or on the Open Sea. If property of subjects of neutral States is vested with enemy character,[2] it is not neutral property in the strict sense of the term neutral, and all rules respecting appropriation, utilisation, and destruction of enemy property obviously apply to it. The object of the right of angary is such property of subjects of neutral States as retains its neutral character from its temporary position on belligerent territory and which therefore is not vested with enemy character. All sorts of neutral property, whether it consists of vessels or other[3] means of transport, or arms, ammunition, provisions, or other personal property, may be the object of the right of angary, provided the articles concerned are serviceable to military ends and wants. The conditions under which the right can be exercised are the same as those under which private enemy property can be utilised or destroyed, but in every case the neutral owner must be fully indemnified.[4]

[1] See Article 39 of the "Règlement sur le régime légal des navires . . . dans les ports étrangers" adopted by the Institute of International Law (Annuaire, XVII. 1898, p. 272): "Le droit d'angarie est supprimé, soit en temps de paix, soit en temps de guerre, quant aux navires neutres."

[2] See above, § 92.

[3] Thus in 1870, during the Franco-German War, the Germans seized hundreds of Swiss and Austrian railway carriages in France and made use of them for military purposes.

[4] See article 6 of U.S. Naval War Code:—"If military necessity should require it, neutral vessels

A remarkable case happened in 1871 during the Franco-German War. The Germans seized some British coal-vessels lying in the river Seine at Duclair, and sank them for the purpose of preventing French gunboats from running up the river. On the intervention of the British Government, Count Bismarck refused to recognise the duty of Germany to indemnify the owners of the sunk vessels, although he agreed to make indemnification.

However, it may safely be maintained that a duty to pay indemnities for any damage done by exercising the right of angary must nowadays be recognised, since articles 52 and 53 of the Hague Regulations stipulate the payment of indemnities for the utilisation of private enemy railway plant, vessels, telephones, telegraphs, arms, and all kinds of war material, and, further, the payment, or at least the giving of a receipt, for requisitions. If, thus, the immunity of private enemy property is recognised, that of private neutral property must certainly be recognised also.

It should be mentioned that article 54 of the Hague Regulations, enacting "the plant of railways coming from neutral States, whether the property of these States, or of companies, or of private persons, shall be sent back as soon as possible," indirectly recognises the right of angary, since it does not prohibit the use of neutral plant, but only requests it to be sent back as soon as possible. And that eventually indemnities must be paid for it, follows

found within the limits of belligerent authority may be seized and destroyed, or otherwise used for military purposes, but in such cases the owners of the neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed upon in advance with the owner or master of the vessel; due regard must be had for treaty stipulations upon these matters." See also, Holland, War, No. 24.

indirectly out of the second part of article 53 of the Hague Regulations.

Right of Angary not deriving from Neutrality.

§ 366. Whatever the extent of the right of angary may be, it does not derive from the law of neutrality. The correlative duty of a belligerent to indemnify the neutral owner of property appropriated or destroyed by the exercise of the right of angary does indeed derive from the law of neutrality. But the right of angary itself is rather a right deriving from the law of war. As a rule this law gives, under certain circumstances and conditions, the right to a belligerent to appropriate enemy property only, but under other circumstances and conditions, and exceptionally, it likewise gives a belligerent the right to appropriate and destroy neutral property.

Pre-emption of Neutral Goods according to Right of Angary.

§ 367. Those Continental writers who do not recognise the existence of so-called conditional contraband maintain that, according to the right of angary, every belligerent has a right to stop all such neutral vessels as carry provisions and other goods with a hostile destination, and to seize such goods on payment of indemnities. The point will be discussed below in § 406.

CHAPTER III

BLOCKADE

I

Conception of Blockade

Grotius, III. c. 1, § 5—Bynkershoek, Quaest. jur. publ. I. c. 2–15—Vattel, III. § 117—Hall, §§ 233, 237–266—Lawrence, §§ 269–276—Maine, pp. 107–109—Manning, pp. 400–412—Phillimore, III. §§ 285–321—Twiss, II. §§ 98–120—Halleck, II. pp. 182–213—Taylor, §§ 674–684—Walker, §§ 76–82—Wharton, III. §§ 359–365—Wheaton, §§ 509–523—Bluntschli, §§ 827–840—Heffter, §§ 154–157—Geffcken in Holtzendorff, IV. pp. 738–771—Ullmann, § 154—Bonfils, Nos. 1608–1659—Despagnet, Nos. 617–637—Pradier-Fodéré, VI. Nos. 2676–2679—Rivier, II. pp. 288–298—Calvo, V. §§ 2827–2908—Fiore, III. Nos. 1606–1629—Martens, II. § 124—Pillet, pp. 129–144—Kleen, I. §§ 124–139—Ortolan, II. pp. 292–336—Hautefeuille, II. pp. 189–288—Gessner, pp. 145–227—Perels, §§ 48–51—Testa, pp. 221–229—Dupuis, Nos. 159–198—Boeck, Nos. 670–726—Holland, Prize Law, §§ 106–140—U.S. Naval War Code, articles 37–43—Bargrave Deane, "The Law of Blockade" (1870)—Fauchille, "Du blocus maritime" (1882)—Carnazza-Amari, "Del blocco maritimo" (1897)—Frémont, "De la saisie des navires en cas de blocus" (1899)—Guynot-Boissière, "Du blocus maritime" (1899)—§§ 35–44 of the "Règlement international des prises maritimes" (Annuaire, IX. 1887, p. 218) adopted by the Institute of International Law.

Definition of Blockade.

§ 368. Blockade is the blocking of the approach to the enemy coast or a part of it by men-of-war [1] for

[1] When in 1861, during the American Civil War, the Federal Government blocked the harbour of Charleston by sinking ships laden with stone, the question arose whether a so-called stone-blockade is lawful. There ought to be no doubt—see below, § 380—that such a stone-blockade is not a blockade in the ordinary sense of the term, and that neutral ships cannot be seized and confiscated for having attempted egress or ingress. But, on the

the purpose of preventing ingress and egress of vessels of all nations. Through blockading a coast a belligerent endeavours to intercept all intercourse, and especially commercial intercourse, by sea between the coast and the world at large. Although blockade is, as shown above in §§ 173 and 174, a means of warfare against the enemy, it concerns neutrals as well, because the ingress and egress of neutral vessels are thereby interdicted and may be punished.

Blockade in the modern sense of the term is an institution which could not develop [1] before neutrality was in some form a recognised institution of the Law of Nations, and before the freedom of neutral commerce was in some form guaranteed. But it took several hundred years for the institution of blockade to reach its present condition, since, until the beginning of the nineteenth century, belligerents frequently made use of so-called paper blockades, which are no longer valid, a blockade now being binding only if effective.

It is on account of the practical importance of blockade for the interests of neutrals that the matter is more conveniently treated together with neutrality than together with war. And it must be emphasised that blockade as a means of warfare must not be confounded with so-called pacific blockade, which is a means of compulsive settlement of State differences.

Blockade strategic and commercial.

§ 369. A blockade is termed strategic if it forms part of other military operations directed against the coast which is blockaded, or if it is declared in order

other hand, there ought to be no doubt either that this mode of obstructing an enemy port is as lawful as any other means of sea warfare, provided the blocking of the harbour is made known so that neutral vessels can avoid the danger of being wrecked. See Wharton, III. § 361A; Fauchille, Blocus, pp. 143–145; Perels, § 35, p. 187.

[1] It dates from the end of the sixteenth century; see Fauchille, Blocus, pp. 2–6.

to cut off supply to enemy forces on shore. In contradistinction to blockade strategic, one speaks of a commercial blockade, when a blockade is declared simply in order to cut off the coast from intercourse with the outside world, although no military operations take place on shore. That blockades commercial are, according to the present rules of International Law, as legitimate as blockades strategic, is generally not denied. But several writers [1] maintain that blockades purely commercial ought to be abolished as not in accordance with the guaranteed freedom of neutral commerce during war.

Blockade to be Universal.

§ 370. A blockade is really in being when vessels of all nations are interdicted and prevented from egress or ingress. Blockade as a means of warfare is admissible only in the form of a *universal* blockade. If the blockading belligerent were to allow the ingress or egress of vessels of one nation, no blockade would exist.[2]

On the other hand, provided a blockade is universal, a special licence of ingress or egress may be given to a special vessel and for a particular purpose, and men-of-war of all neutral nations may be allowed to pass to and fro unhindered. Thus, when during the American Civil War the Federal Government blockaded the coast of the Confederate States, neutral men-of-war were not prevented from ingress and egress. But it must be specially observed that a belligerent has a right to prevent neutral men-of-war from passing through the line of blockade, and it is totally within his discretion whether or not he will admit or exclude such men-of-war.

§ 371. As a rule a blockade is declared for the

[1] See Hall, § 233.

[2] The Rolla, 6 Rob. 364; the Franciska, Spinks, 287. See also below, § 382.

purpose of preventing ingress as well as egress. But sometimes only the egress or only the ingress is prevented. In such cases one speaks of "Blockade outwards" and of "Blockade inwards" respectively. Thus the blockade of the mouth of the Danube declared by the Allies in 1854 during the Crimean War was a "blockade inwards," since the only purpose was to prevent supply of the Russian Army from the sea.[1]

Blockade Outwards and Inwards

§ 372. It is sometimes asserted[2] that only ports, or even only fortified ports, can be blockaded, but the practice of the States shows that single ports and portions of an enemy coast as well as the whole of the enemy coast can be blockaded. Thus during the American Civil War the whole of the coast of the Confederate States to the extent of about 2,500 nautical miles was blockaded. And it must be specially observed that such ports of a belligerent as are in the hands of the enemy may be the object of a blockade. Thus during the Franco-German War the French blockaded[3] their own ports of Rouen, Dieppe, and Fécamp, which were occupied by the Germans.

What Places can be Blockaded.

§ 373. It is a moot question whether the mouth of a so-called international river may be the object of a blockade, in case not all the riparian States are belligerents. Thus, when in 1854, during the Crimean War, the allied fleets of Great Britain and France blockaded the mouth of the Danube, Bavaria and Würtemberg, which remained neutral, protested. When in 1870 the French blockaded the whole of the German coast of the North Sea, they exempted

Blockade of International Rivers.

[1] The Gerasimo, 11 Moore, P.C. 88.

[2] Napoleon I. maintained in his Berlin Decrees: "Le droit de blocus, d'après la raison et l'usage de tous les peuples policés, n'est applicable qu'aux places fortes."

[3] See Fauchille, Blocus, p. 161.

the mouth of the river Ems, because it runs partly through Holland. And when in 1863, during the blockade of the coast of the Confederate States, the Federal cruiser "Vanderbilt" captured the British vessel "Peterhoff"[1] destined for Matamaros, on the Mexican shore of the Rio Grande, the American Courts released the vessel on the ground that trade with Mexico, which was neutral, could not be prohibited.

Justification of Blockade.

§ 374. The question has been raised in what way blockade, which vests a belligerent with a certain jurisdiction over neutral vessels and which has detrimental consequences for neutral trade, could be justified.[2] Several writers, following Hautefeuille,[3] maintain that the establishment of a blockade by a belligerent stationing a number of men-of-war so as to block the approach to the coast includes conquest of that part of the sea, and that such conquest justifies a belligerent in prohibiting ingress and egress of vessels of all nations. In contradistinction to this artificial construction of a conquest of a part of the sea, some writers[4] try to justify blockade by the necessity of war. I think, however, no special justification of blockade is necessary at all. The fact is that the detrimental consequences of blockade for neutrals stand in the same category as the many other detrimental consequences of war for neutrals. Neither the one nor the other need be specially justified. A blockade interferes indeed with the recognised principle of the freedom of the sea, and, further, with the recognised freedom of neutral commerce.

[1] 5 Wallace, 49. See Fauchille, Blocus, pp. 171–183; Phillimore, III. § 293 A; Hall, § 266; Rivier, II. p. 291.

[2] The matter is thoroughly treated by Fauchille, Blocus, pp. 13–36.

[3] See Hautefeuille, II. pp. 190–191.

[4] See Gessner, p. 151; Bluntschli, § 827; Martens, II. § 124.

But all three have developed together, and when the freedom of the sea in time of peace and war, and, further, when the freedom of neutral commerce became generally recognised, the exceptional restrictions of blockade became at the same time recognised as legitimate.

II

Establishment of Blockade

See the literature quoted above at the commencement of § 368.

Competence to establish Blockade.

§ 375. A declaration of blockade being "a high[1] act of sovereignty" and having far-reaching consequences upon neutral trade, it is generally recognised not to be in the discretion of a commander to establish blockade without the authority of his Government. Such authority may be granted purposely for a particular blockade, the Government ordering the commander of a squadron to blockade a certain port or coast. Or a Government may expressly delegate its power to blockade to a commander for use at his discretion. And if operations of war take place at great distance[2] from the seat of Government and a commander finds it necessary to establish a blockade, the latter may become valid through his Government giving its immediate consent after being informed of the act of the commander. And, further, the powers vested in the hands of the supreme commander of a fleet are supposed to include the authority to establish a blockade in case he finds it necessary, provided that his Government acquiesces as soon as it is informed of the establishment of the blockade.[3]

[1] The Henrik and Maria, 1 Rob. 146.

[2] The Rolla, 6 Rob. 364.

[3] As regards the whole matter, see Fauchille, Blocus, pp. 68–73.

Notification of Blockade.

§ 376. A blockade is not in being *ipso facto* by the outbreak of war. And even the actual blocking of the approach to an enemy coast by belligerent men-of-war need not by itself mean that the ingress and egress of *neutral* vessels are to be prohibited, since it may take place for the purpose of preventing the egress and ingress of *enemy* vessels only. Continental writers consider, therefore, notification essential for the establishment of a blockade. English, American, and Japanese writers, however, do not hold notification essential, although they consider knowledge of the existing blockade on the part of a neutral vessel to be necessary for her condemnation for breach of blockade.[1]

But although they hold notification essential for the establishment of blockade, Continental writers differ with regard to the kind of notification that is necessary. Some writers[2] maintain that three different notifications must take place—namely, first, a local notification to the authorities of the blockaded ports or coast; secondly, a diplomatic or general notification to all maritime neutral States by the blockading belligerent; and, thirdly, a special notification to every approaching neutral vessel. Other writers[3] consider only diplomatic and special notification essential. Again others[4] maintain that special notification to every approaching neutral vessel is alone required, although they recommend diplomatic notification as a matter of courtesy.

As regards the practice of States, it is usual for the commander establishing a blockade to send a

[1] See below, § 384.

[2] See, for instance, Kleen, I. § 131.

[3] See, for instance, Bluntschli, §§ 831–832; Martens, II. § 124, Gessner, p. 181.

[4] See, for instance, Hautefeuille, II. pp. 224 and 226; Calvo, V. § 2846; Fauchille, pp. 219–221.

declaration of blockade to the authorities of the blockaded ports or coast and the foreign consuls there. It is, further, usual for the blockading Government to notify the fact diplomatically to all neutral maritime States. And some States, as France and Italy, order their blockading men-of-war to board every approaching neutral vessel and notify her of the establishment of the blockade. But Great Britain, the United States of America, and Japan do not consider notification essential for the institution of a blockade. They hold the simple fact alone that the approach is blocked, and the egress and ingress of neutral vessels are actually prevented, to be sufficient to make the existence of a blockade known, and, when no diplomatic notification has taken place, they do not seize a vessel for breach of blockade whose master had no actual notice of the existence of the blockade. English,[1] American,[2] and Japanese[3] practice, accordingly, makes a distinction between a so-called *de facto* blockade on the one hand, and, on the other, a notified blockade.

Space of Time for Egress of Neutral Vessels.

§ 377. As regards ingress, a blockade becomes valid from the moment it is established; even vessels in ballast have no right of ingress. But as regards egress, it is usual for the blockading commander to grant a certain space of time within which neutral vessels may leave the blockaded ports unhindered. No rule exists respecting the extent of such space of time, but fifteen days are usually granted.[4]

End of Blockade.

§ 378. Apart from the conclusion of peace, a blockade can come to an end in three different ways.

[1] The Vrouw Judith, 1 Rob. 150.

[2] See U.S. Naval War Code, articles 39-40.

[3] See Japanese Prize Law, article 30.

[4] According to U.S. Naval War Code, article 43, thirty days are allowed "unless otherwise specially ordered."

It may, first, be raised by the blockading State for any reason it likes, and in this case it is usual to notify the end of blockade to all neutral maritime States. A blockade may, secondly, come to an end through an enemy force driving off the blockading squadron or fleet. In such case the blockade ends *ipso facto* by the blockading squadron being driven away, whatever their intention to return may be. Should the squadron return and resume the blockade, it must be considered as new, and not simply the continuation of the former blockade. The third ground for the ending of a blockade is its failure for any reason to be effective, a point which will be treated below in § 382.

III

Effectiveness of Blockade

See the literature quoted above at the commencement of § 368.

Effective in Contradistinction to Fictitious Blockade.

§ 379. The necessity of effectiveness in a blockade by means of the presence of a blockading squadron of sufficient strength to prevent egress and ingress of vessels became gradually recognised during the first half of the nineteenth century, and it became formally enacted as a principle of the Law of Nations through the Declaration of Paris in 1856. Effective blockade is the contrast to so-called fictitious or paper blockade, which was frequently practised during the seventeenth, eighteenth, and at the beginning of the nineteenth century.[1] Fictitious blockade consists in the declaration and notification that a port or a coast is blockaded without, however, posting a sufficient

[1] See Fauchille, Blocus, pp. 74–109.

number of men-of-war on the spot to be really able to prevent egress and ingress of every vessel. It was one of the principles of the First and the Second Armed Neutrality that a blockade should always be effective, but it was not till after the Napoleonic wars that this principle gradually found general recognition. Nowadays such States as have not acceded to the Declaration of Paris nevertheless do not dissent regarding the necessity of effectiveness of blockade.

Condition of Effectiveness of Blockade.

§ 380. The condition of effectiveness of blockade, as defined by the Declaration of Paris, is its maintenance "by such a force as is sufficient really to prevent access to the coast." But no unanimity exists respecting the requirements of an effective blockade according to this definition. Apart from differences of opinion regarding points of minor interest, it may be stated that in the main there are two conflicting opinions.

According to the one opinion the definition of an effective blockade already pronounced by the First Armed Neutrality of 1780 is valid, and a blockade is effective only when the approach to the coast is barred by a chain of men-of-war anchored on the spot and so near to one another that the line cannot be passed without obvious danger to the passing vessel.[1] This corresponds to the practice of France.

According to the other opinion, a blockade is effective when the approach is watched—to use the words of Dr. Lushington [2]—"by a force sufficient to render

[1] See Hautefeuille, II. p. 194; Gessner, p. 179; Kleen, I. § 129; Boeck, Nos. 676-681; Dupuis, Nos. 173-174; Fauchille, Blocus, pp. 110-142. Phillimore, III. § 293 takes up the same standpoint in so far as a blockade *de facto* is concerned:—"A blockade *de facto* should be effected by stationing a number of ships, and forming as it were an arch of circumvallation round the mouth of the prohibited port, where, if the arch fails in any one part, the blockade itself fails altogether."

[2] In his judgment in the case of the Franciska, Spinks, 287.

the egress and ingress dangerous, or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable." According to this opinion there need be no chain of anchored men-of-war to expose any vessels attempting to break the blockade to a cross fire, but a real danger of capture suffices, whether the danger is caused by cruising or anchored men-of-war. This is the standpoint of theory and practice of Great Britain and the United States, and it seems likewise to be that of Germany and several German writers.[1] The blockade during the American War of the whole coast of the Confederate States of the extent of 2,500 nautical miles by four hundred Federal cruisers could, of course, only be maintained by cruising vessels; and the fact that all neutral maritime States recognised it as effective shows that the opinion of dissenting writers has more theoretical than practical importance.

The real danger to passing vessels being the characteristic of effectiveness of blockade, it must be recognised that in certain cases and in the absence of a sufficient number of men-of-war a blockade may be made effective through planting land batteries within range of any vessel attempting to pass.[2] But a stone blockade, so called because vessels laden with stones are sunk in the channel to block the approach—see above, § 368, note 1—is not an effective blockade.

And it must, lastly, be mentioned that the distance of the blockading men-of-war from the blockaded

[1] See Perels, § 49; Bluntschli, § 829; Liszt, § 41, IV.

[2] The Nancy, 1 Acton, 63; the Circassian, 2 Wallace, 135; the Olinde Rodrigues, 174, United States, 510. See also Bluntschli, § 829; Perels, § 49; Geffcken in Holtzendorff, IV. p. 750; Walker, Manual, § 78.

port or coast is immaterial, as long as the circumstances and conditions of the special case justify such distance. Thus during the Crimean War the port of Riga was blockaded by a man-of-war stationed at a distance of 120 miles from the town in the Lyser Ort, a channel three miles wide forming the only approach to the gulf.[1]

Amount of Danger which creates Effectiveness.

§ 381. It is impossible to state exactly what amount of danger to a vessel attempting to pass is necessary to prove an effective blockade. It is recognised that a blockade does not cease to be effective in case now and then a vessel succeeds in passing the line unhindered, provided there was so much danger as to make her capture probable. Dr. Lushington strikingly dealt with the matter in the following words:[2]—"The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a port. Nothing is further from my intention, nor indeed more opposed to my notions, than any relaxation of the rule that a blockade must be sufficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence, I believe that in every case the inquiry has been, whether the force was competent and present, and, if so, the performance of the duty was presumed; and I think I may safely assert that in no case was a blockade held to be void, when the blockading force was on the spot or near thereto, on the ground of

[1] The Franciska, Spinks, 287. See Hall, § 260, and Holland, Studies, pp. 166-167.

[2] In his judgment in the case of the Franciska, Spinks, 287.

vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron."

Cessation of Effectiveness.

§ 382. A blockade is effective so long as the danger lasts which makes probable the capture of such vessels as attempt to pass the approach. A blockade, therefore, ceases *ipso facto* by the absence of such danger, whether the blockading men-of-war are driven away, or are sent away for the fulfilment of some task which has nothing to do with the blockade, or voluntarily withdraw, or allow the passage of vessels in other cases than those which are exceptionally admissible. Thus, when in 1861, during the American Civil War, the Federal cruiser "Niagara," which blockaded Charleston, was sent away and her place was taken after five days by the "Minnesota," the blockade ceased to be effective, although the Federal Government refused to recognise this.[1] Thus, further, when during the Crimean War Great Britain allowed Russian vessels to export goods from blockaded ports, and accordingly the egress of such vessels from the blockaded port of Riga was permitted, the blockade of Riga ceased to be effective, because it tried to interfere with neutral commerce only; the capture of the Danish vessel "Franciska"[2] for attempting to break the blockade was, therefore, not upheld.

On the other hand, practice[3] and the majority of writers recognise the fact that a blockade does not cease to be effective in case the blockading force is driven away for a short time through stress of weather. English[4] writers, further, deny that a blockade loses effectiveness through a blockading

[1] See Mountague Bernard, Neutrality of Great Britain during the American Civil War (1870), pp. 237–239.

[2] Spinks, 287. See above, § 370.

[3] The Columbia, 1 Rob. 154.

[4] See Twiss, II. § 103, p. 201, and Phillimore, III. § 294.

man-of-war being absent for a short time for the purpose of chasing a vessel which succeeded in passing the approach unhindered.[1]

IV

Breach of Blockade

See the literature quoted above at the commencement of § 368.

Definition of Breach of Blockade.

§ 383. Breach or violation of blockade is the unallowed ingress or egress of a vessel in spite of the blockade. The attempted breach is, as far as punishment is concerned, treated in the same way as the consummated breach, but the practice of States differs with regard to the question at what time and by what act an attempt to break a blockade commences.

But it must be specially observed that the blockade-runner violates International Law as little as the contraband carrier. Both (see below, § 398) violate injunctions of the belligerent concerned.

No Breach without Notice of Blockade.

§ 384. Since breach of blockade is, from the standpoint of the blockading belligerent, a criminal act, knowledge on the part of a vessel of the existence of a blockade is essential for making her egress or ingress a breach of blockade. It is for this reason that Continental theory and practice do not consider a blockade established without local and diplomatic notification, so that every vessel may have, or may be supposed to have, notice of the existence of a blockade. And for the same reason some States, as France and Italy, never consider a vessel to have committed a breach of blockade unless a special warning was given her before her attempted ingress

[1] See article 37 of U.S. Naval War Code.

by one of the blockading cruisers stopping her and recording the warning upon her log-book.[1]

British, American, and Japanese practice regarding the necessary knowledge of the existence of a blockade on the part of a vessel makes a distinction between actual and constructive notice, no breach of blockade being held to exist without either the one or the other.[2] Actual notice is knowledge acquired by a vessel of the existing blockade, whether through a direct warning from one of the blockading men-of-war or knowledge acquired from any other public or private source of information. Constructive knowledge is presumed knowledge of the blockade on the part of a vessel on the ground either of notoriety or of diplomatic notification. The existence of a blockade is always presumed to be notorious to vessels within the blockaded ports, but it is a question of fact whether it is notorious to other vessels. And knowledge of the existence of a blockade is always presumed on the part of a vessel in case sufficient time has elapsed since the home State of the vessel has received diplomatic notification of the blockade, so that it could inform thereof all vessels sailing under its flag, whether or not they have actually received, or taken notice of, the information.[3]

What constitutes an Attempt to break Blockade.

§ 385. The practice of the States as well as the opinions of writers differ much regarding such acts of a vessel as constitute an attempt to break blockade.

(1) The Second Armed Neutrality of 1800 intended to restrict an attempt to break blockade to the employment of force or ruse by a vessel on the line

[1] See above, § 376.

[2] See Holland, Prize Law, §§ 107, 114–127; U.S. Naval War Code, article 39; Japanese Prize Law, article 30.

[3] The Vrouw Judith, 1 Rob. 150; the Neptunus, 2 Rob. 110; the Calypso, 2 Rob. 298; the Neptunus, 3 Rob. 173; the Hoffnung, 6 Rob. 112.

of blockade for the purpose of passing through. This is, on the whole, the practice of France, which moreover, as stated before, requires that the vessel shall previous to the attempt have received special warning from one of the blockading men-of-war. Many writers [1] take the same standpoint.

(2) The practice of other States, as Japan, approved by many writers,[2] goes beyond this and considers it an attempt to break blockade for a vessel, with or without force or ruse, to endeavour to pass the line of blockade. This practice frequently sees an attempt complete in the fact that a vessel destined for a blockaded place is found anchoring or cruising near the line of blockade.

(3) The practice of Great Britain and the United States of America goes farthest, since it considers it an attempted breach of blockade for a vessel, not destined according to her ship papers for a blockaded port, to be found near it and steering for it, and, further, for a vessel destined for a port the blockade of which was diplomatically notified to start on her journey knowing that the blockade has not yet been raised, except, "when the port from which the vessel sails is so distant from the scene of war as to justify her master in starting with a destination known to be blockaded, on the chance of finding that the blockade has been removed, and, should that not prove to be the case, with an intention of changing her destination." [3] This practice, further, applies

[1] See Hautefeuille, II. p. 134; Kleen, I. § 137; Gessner, p. 202; Dupuis, No. 185; Fauchille, Blocus, p. 322.

[2] See Bluntschli, § 835; Perels, § 51; Geffcken in Holtzendorff, IV. p. 763; Rivier, II. p. 431. See also § 25 of the Prussian Regulations concerning Naval Prizes, and article 31 of the Japanese Naval Prize Law.

[3] See Holland, Prize Law, § 133, and U.S. Naval War Code, article 42; the Betsy, 1 Rob. 332.

the doctrine of continuous voyages[1] to blockade, for it considers an attempt of breach of blockade to have been committed by such vessel as, although ostensibly destined for a neutral or an unblockaded port, is in reality intended, after touching there, to go on to a blockaded port.[2]

(4) During the Civil War the American Prize Courts carried the practice further by condemning such vessels for breach of blockade as knowingly carried to a neutral port cargo which was ultimately destined for a blockaded port, and by condemning for breach of blockade such cargo, without the vessel, as was ultimately destined for a blockaded port, the carrying vessel being ignorant of this ulterior destination of the cargo. Thus the "Bermuda,"[3] a British vessel with a cargo, part of which was, in the opinion of the American Courts, ultimately destined for the blockaded ports of the Confederate States, was seized on her voyage to the neutral British port of Nassau, in the Bahama Islands, and was condemned for breach

[1] The so-called doctrine of continuous voyages dates from the time of the Anglo-French wars at the end of the eighteenth century, and is connected with the application of the so-called rule of 1756. (See above, § 289.) Neutral vessels engaged in French and Spanish colonial trade, thrown open to them during the war, sought to evade seizure by British cruisers and condemnation by British Prize Courts, according to the rule of 1756, by taking their cargo to a neutral port, landing it and paying import duties there, and then re-lading it and carrying it to the mother country of the respective colony. Thus, in the case of the "William" (5 Rob. 385), it was proved that this neutral vessel took a cargo from the Spanish port La Guira to the port of Marblehead in Massachusetts—the United States being neutral—landed the cargo, paid import duties there, then took in the chief part of this cargo besides other goods, and sailed after a week for the Spanish port of Bilbao. In all such cases the British Prize Courts considered the voyages from the colonial port to the neutral port and from there to the enemy port as one continuous voyage and confirmed the seizure of the ships concerned. See Remy, Théorie de la continuauté du voyage en matière de blocus et de contrebande (1902).

[2] See Holland, Prize Law, § 134. The James Cook, Edwards, 261.

[3] 3 Wallace, 514.

of blockade by the American Courts. The same happened to the British vessel "Stephen Hart,"[1] which was seized on her voyage to the neutral port of Cardenas, in Cuba. And in the famous case of the "Springbok,"[2] a British vessel also destined for Nassau, in the Bahama Islands, which was seized on her voyage to this neutral British port, the cargo alone was finally condemned for breach of blockade, since, in the opinion of the Court, the vessel was not cognisant of the ulterior destination of the cargo for a blockaded port. The same happened to the cargo of the British vessel "Peterhoff"[3] destined for the neutral port of Matamaros, in Mexico. The British Government declined to intervene in favour of the British owners of the respective vessels and cargoes.[4]

It is true that the majority of authorities[5] assert the illegality of these judgments of the American Prize Courts, but the fact that Great Britain recognises as correct the principles which are the basis of these judgments will probably have the consequence that they will in future be applied by British as well as foreign Prize Courts. The whole matter calls for an international agreement of the members of the Family of Nations.

When Ingress is not considered Breach of Blockade.

§ 386. Although blockade inwards interdicts ingress to all vessels, if not especially licensed, necessity makes exceptions to the rule. Whenever a

[1] 3 Wallace, 559.
[2] 5 Wallace, 1.
[3] 5 Wallace, 28.
[4] See Parliamentary Papers, Miscellaneous, N. 1 (1900) "Correspondence regarding the Seizure of the British Vessels Springbok and Peterhoff by the United States Cruisers in 1863."
[5] See, for instance, Holland, Prize Law, p. 38, note 2; Phillimore, III. § 298; Twiss, Belligerent Right on the High Seas (1884), p. 19; Hall, § 263; Gessner, Kriegführende und neutrale Mächte (1877), pp. 95–100; Bluntschli, § 835; Perels, § 51; Fauchille, pp. 333–344; Ullmann, § 154, p. 331, note 6; Martens, II. § 124. See also Wharton, III. § 362, p. 401.

vessel is by need of repairs,[1] stress of weather,[2] want of water[3] or provisions, or upon any other ground absolutely obliged to enter a blockaded port, such ingress does not constitute a breach of blockade.

On the other hand, according to the British practice at least, ingress does not cease to be breach of blockade if caused by intoxication of the master,[4] ignorance[5] of the coast, loss of compass,[6] endeavour to get a pilot,[7] and the like, or an attempt to ascertain[8] whether the blockade was not raised.[9]

When Egress is not considered Breach of Blockade.

§ 387. There are a few cases of egress which are, according to British and most other States' practice, not considered breaches of blockade outwards.[10] Thus, a vessel that was in the blockaded port before the commencement of the blockade[11] may sail from this port in ballast, as may a vessel that entered during a blockade either in ignorance of it or with the permission of the blockading squadron.[12] Thus, further, a vessel the cargo of which was put on board before the commencement of the blockade may leave the port afterwards unhindered.[13] Thus, again, a vessel obliged by absolute necessity to enter a blockaded port may afterwards leave it unhindered. And a vessel employed by the diplomatic envoy of a neutral State for the exclusive purpose of sending home from a blockaded port distressed seamen of his nationality may also pass unhindered.[14]

[1] The Charlotte, Edwards 252.
[2] The Fortuna, 5 Rob. 27.
[3] The Hurtige Hanne, 2 Rob. 124.
[4] The Shepherdess, 5 Rob. 262.
[5] The Adonis, 5 Rob. 256.
[6] The Elizabeth, Edwards, 198.
[7] The Neutralitet, 6 Rob. 30.
[8] The Spes and Irene, 5 Rob. 76.
[9] See Holland, Prize Law, §§ 135–136.
[10] See Holland, Prize Law, § 130; Twiss, II. § 113; Phillimore, III. § 313.
[11] The Frederick Moltke, 1 Rob. 86.
[12] The Juno, 2 Rob. 116.
[13] The Vrouw Judith, 1 Rob. 150.
[14] The Rose in Bloom, 1 Dodson, 55.

§ 388. A breach of blockade can only be committed by passing through the blockaded approach. Therefore, if the maritime approach to a port is blockaded from which an inland canal leads to another unblockaded port of the enemy or to a neutral port, no breach of blockade is committed through the egress or the ingress of a vessel passing such canal for the purpose of reaching the blockaded port.[1]

Passage through Unblockaded Canal no Breach of Blockade.

V

Consequences of Breach of Blockade

See the literature quoted above at the commencement of § 368.

§ 389. It is generally recognised that a vessel may be captured for a breach of blockade *in delicto* only, that means, during the time an attempt to break it, or the breach itself, is committed. But here again practice as well as theory differ much, since there is no unanimity with regard to the extent of time during which an attempt of breach and the breach itself can be said to be actually continuing.

Capture of Blockad-running Vessels.

(1) It has already been stated above in § 385 that it is a moot point when an attempt to break a blockade can be said to be continuing, and that according to the practice of Great Britain and the United States such attempt is already to be found in the fact that a vessel destined for a blockaded port is starting on her voyage. It is obvious that the controversy bears upon the question from what point of time a blockade-running vessel must be considered *in delicto*.

(2) But it is likewise a moot point when the period

[1] The Stert, 4 Rob. 65. See Phillimore, III. § 314.

of time comes to an end during which a blockade-running vessel may be said to be *in delicto*. According to Continental theory and practice, such vessel is *in delicto* only as long as she is on the spot of the line of blockade, or, having fled from there, as long as she is pursued by one of the blockading cruisers. On the other hand, according to the practice of Great Britain [1] and the United States,[2] a blockade-running vessel is held to be *in delicto* as long as she *has not completed her voyage from the blockaded port to the port of her destination and back to the port from which she started originally*, the voyage out and home being considered one voyage. But a vessel is held to be *in delicto* as long only as the blockade continues, capture being no longer admissible in case the blockade has been raised or has otherwise come to an end.

Penalty for Breach of Blockade.

§ 390. Capture being effected, the blockade-runner is to be sent to a port to be brought before a Prize Court. For this purpose the crew may be temporarily detained, as they will have to serve as witnesses. In former times the crew could be imprisoned, and it is said that even capital [3] punishment could have been pronounced against them. But since the eighteenth century this practice has been abandoned, and nowadays the crew cannot even be made prisoners of war, but must be released as soon as the Prize Court has pronounced its verdict.[4] The only penalty which may be pronounced is confiscation of the vessel and the cargo. But the practice [5] of the different States differs much concerning the penalty for breach of blockade.

[1] The Welvaart van Pillaw, 2 Rob. 128; General Hamilton, 6 Rob. 61.

[2] See U.S. Naval War Code, article 44.

[3] See Bynkershoek, Quaest. jur. publ., I. c. 11.

[4] See Calvo, V. §§ 2897–2898. U.S. Naval War Code, article 45.

[5] See Fauchille, Blocus, pp. 357–394; Gessner, pp. 210–214; Perels, § 51, pp. 276–278.

According to British and American practice, confiscation of both vessel and cargo takes place in case the owners of the vessel are identical with those of the cargo. In case vessel and cargo have not the same owners, confiscation of both takes place only when either the cargo consists of contraband of war or the owners knew of the blockade at the time the cargo was shipped for the blockaded port.[1] And it matters not whether the captured vessel which carries the cargo has herself actually passed through the blockaded line, or the breach of blockade was effected through a combined action of lighters and the vessel, the lighters passing the line and discharging the cargo into the vessel near the line, or *vice versâ*.[2]

The cargo alone was confiscated according to the judgments of the American Prize Courts during the Civil War in the case of the "Springbok" and in similar cases[3] when goods ultimately destined for a blockaded port were sent to a neutral port on a vessel whose owners were ignorant of this ulterior destination of the goods.

[1] The Mercurius, 1 Rob. 80; Columbia, 1 Rob. 154; Alexander, 4 Rob. 93; Adonis, 5 Rob. 256; Exchange, Edwards, 39; Panaghia Rhombia, 12 Moore, P.C. 168. See Phillimore, III. §§ 318–319.

[2] The Maria, 6 Rob. 201.

[3] See above, § 385 (4).

CHAPTER IV

CONTRABAND

I

Conception of Contraband

Grotius, III. c. 1, § 5—Bynkershoek, Quaest. jur. publ. I. cc. IX–XII —Vattel, III. §§ 111–113—Hall, §§ 236–247—Lawrence, §§ 277–281 —Maine, pp. 96–122—Manning, pp. 352–399—Phillimore, III §§ 226–284—Twiss, II. §§ 121–151—Halleck, II. pp. 214–238—Taylor, §§ 653–666—Walker, §§ 73–75—Wharton, III. §§ 368–375—Wheaton, §§ 476–508—Bluntschli, §§ 801–814—Heffter, §§ 158–161 —Geffcken in Holtzendorff, IV. pp. 713–731—Gareis, § 89—Liszt, § 42—Ullmann, § 166—Bonfils, Nos. 1537–1587—Despagnet, Nos. 687–690—Rivier, II. pp. 416–423—Calvo, V. §§ 2708–2795—Fiore, III. Nos. 1591–1601—Martens, II. § 136—Kleen, I. §§ 70–102—Boeck, Nos. 606–659—Pillet, pp. 315–330—Gessner, pp. 70–144—Perels, §§ 44–46—Testa, pp. 201–220—Lawrence, War, pp. 140–174—Ortolan, II. pp. 165–213—Hautefeuille, II. pp. 69–172—Dupuis, Nos. 199–230—Holland, Prize Law, §§ 57–87—U.S. Naval War Code, articles 34–36—Heineccius, "De navibus ob vecturam vetitarum mercium commissis dissertatio" (1740)—Huebner, "De la saisie des bâtiments neutres," 2 vols. (1759)—Valin, "Traité des prises," 2 vols. (1763)—Martens, "Essai sur les armateurs, les prises, et surtout les reprises" (1795)—Lampredi, "Del commercio dei populi neutrali in tempo di guerra" (1801)—Tetens, "Considérations sur les droits réciproques des puissances belligérantes et des puissances neutres sur mer" (1805)—Pistoye et Duverdy, "Traité des prises maritimes," 2 vols. (1855)—Moseley, "What is Contraband and what is not?" (1861)—Upton, "The Law of Nations affecting Commerce during War" (1863)—Lehmann, "Die Zufuhr von Kriegscontrebandewaren, etc." (1877)—Kleen, "De contrebande de guerre et des transports interdits aux neutres" (1893)—Vossen, "Die Kontrebande des Krieges" (1896)—Manceaux, "De la contrebande de guerre" (1899)—Brochet, "De la contrebande de guerre" (1900)—Hirsch, "Kriegscontrebande und verbotene Transporte in Kriegszeiten" (1901)—Pincitore, "Il contrabbando di guerra" (1902)—Knight, "Des états neutres au point de vue de la contrebande de guerre" (1903)—Wiegner, "Die Kriegskontrebande" (1904)—Westlake in R.I., II. (1870), pp. 614–

655—Kleen in R.I., XXV. (1893), pp. 7, 124, 209, 389, and XXVI. pp. 214-217 (1894)—Bar in R.I., XXVI. (1894), pp. 401-414—Brocher de la Fléchère in R.I., 2nd ser. I. (1899), pp. 337-353—Fauchille in R.G., IV. (1897), pp. 297-323—Kleen in R.G., XI. (1904), pp. 353-362—Gover in the "Journal of the Society of Comparative Legislation," new series, II. (1900) pp. 118-130.

Definition of Contraband of War.

§ 391. The term contraband derives from the Italian "contrabbando," which, itself deriving from the Latin "contra" and "bannum" or "bandum," means "in defiance of an injunction." Contraband of war is the designation of such goods as are interdicted by either belligerent to be carried to the enemy on the ground that they enable the latter to carry on the war with greater vigour. But this definition is only a formal one, as it does not say what kinds of goods belong to the class of contraband. This point is indeed, and always was, much controverted. The matter still stands as Grotius explained it. Although he does not employ the term contraband, he treats of the matter. He [1] distinguishes three different kinds of articles. Firstly, those which, as arms for instance, can only be made use of in war, and which are, therefore, always contraband. Secondly, those, as articles of luxury, which can never be made use of in war and which, therefore, are never contraband. Thirdly, those which, as money, provisions, ships, and articles of naval equipment, may be made use of in war as well as in peace, and which are on account of their ancipitous use contraband or not according to the circumstances of the case. In spite of Bynkershoek's decided opposition [2] to this distinction of Grotius, the

[1] See Grotius, III. c. 1, § 5:—"Sunt res quae in bello tantum usum habent, ut arma: sunt quae in bello nullum habent usum, ut quae voluptati inserviunt: sunt quae et in bello et extra bellum usum habent, ut pecuniae, commeatus, naves, et quae navibus adsunt. . . . In tertio illo genere usus ancipitis, distinguendus erit belli status. . . "

[2] See Bynkershoek, Quaest. jur. publici, I. c. X.

practice of most belligerents has down to the present day been in conformity with it. A great many treaties have from the beginning of the sixteenth century been concluded between different States for the purpose of fixing what articles belonging to the class of ancipitous use should and what should not be regarded as contraband between the parties, but all these treaties disagree with one another. And, as far as they are not bound by a treaty, belligerents always have exercised, and still exercise, their discretion in every war according to the special circumstances and conditions in regarding or not regarding certain articles of ancipitous use as contraband. The endeavour of the First and the Second Armed Neutrality of 1780 and 1800 to restrict once for all the number and kinds of articles that could be regarded as contraband failed, and the Declaration of Paris of 1856 uses the term contraband without any attempt to define it.[1]

Absolute and conditional Contraband.

§ 392. Apart from the distinction between articles which can be made use of only in war and those of ancipitous use, two different classes of contraband must be distinguished.

There are, first, articles which by their very character are primarily and ordinarily destined to be made use of in war. In this class are to be reckoned not only arms and ammunition, but also such articles of ancipitous use as military stores, naval stores, and the like. They are termed absolute contraband.

There are, secondly, articles which by their very character are primarily and ordinarily not destined to be made use of in war, but which under certain

[1] Although—see above, §§ 173–174—prevention of carriage of contraband is a means of sea warfare against the enemy, it chiefly concerns neutral commerce and is, therefore, more conveniently treated together with neutrality.

circumstances and conditions may be of the greatest use for a belligerent for the continuation of the war. To this class belong, for instance, horses, provisions, and coal. These articles are termed conditional or relative contraband.

Although all States do not make this distinction, they distinguish nevertheless, in so far as they vary in their different wars, the list of articles which they declare contraband: certain articles, as arms and ammunition, being always on the list, other articles being considered contraband only then when the circumstances of a particular war make it necessary. The majority of writers approve of the distinction between absolute and conditional contraband, although there are several who insist that arms and ammunition only and exclusively can be recognised as contraband, and that conditional contraband does not exist.[1] The distinction would seem to be important not only regarding the question whether or not an article is contraband, but also regarding the consequences of carrying contraband.[2]

Articles absolutely Contraband.

§ 393. That absolute contraband cannot and need not be restricted to arms and ammunition only and exclusively becomes obvious, if the fact is taken into consideration that other articles, although of ancipitous use, may be as valuable and essential to a belligerent for the continuance of the war as arms and ammunition. The necessary machinery and material for the manufacture of arms and ammunition are almost as valuable as the latter themselves, and warfare on sea can as little be waged without vessels and articles of naval equipment as without arms and ammunition. But no unanimity exists with

[1] See, for instance, Hautefeuille, II. p. 157, and Kleen, I. § 90.
[2] See below, § 406.

regard to such articles of ancipitous use as have to be considered as absolute contraband, and States, when they go to war, increase or restrict, according to the circumstances of the particular war, the list of articles they consider absolute contraband.

According to British practice[1]—subject, however, to the prerogative of the Crown to order alterations of the list during a war—the following articles are considered absolute contraband: Arms of all kinds, and machinery for manufacturing arms; ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash (chloride of potassium), chlorate of potash, and nitrate of soda; gunpowder and its materials, saltpetre and brimstone, also guncotton; military equipments and clothing; military stores; naval stores, such as masts, spars, rudders, ship timbers, hemp and cordage, sailcloth, pitch and tar, copper for sheathing vessels, marine engines and the component parts thereof (including screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates and fire bars), maritime cement and the materials used for its manufacture (as blue lias and Portland cement), iron in any of the following forms: anchors, rivet-iron, angle-iron, round bars of from $\frac{3}{4}$ to $\frac{5}{8}$ of an inch diameter, rivets, strips of iron, sheet plate-iron exceeding $\frac{1}{4}$ of an inch, and Low Moor and Bowling plates.

It must be specially observed that, although belligerents must have a free hand in increasing or restricting, according to the circumstances of the particular war, the list of articles of absolute contraband, it ought not altogether to be left to the discretion of belligerents to declare any articles they like as absolute contraband. The test to be applied

[1] See Holland, Prize Law, § 62.

is whether, under the special circumstances of a particular war, the article concerned is by its character primarily and ordinarily destined to be made use of for military or naval purposes. If that is not the case, an article ought not to be declared absolute contraband, although it may be declared contraband when clearly destined for military or naval purposes. Thus, for instance, provisions are not by their character primarily and ordinarily destined to be made use of in war, and they can for this reason not be declared absolute contraband, although they may be declared conditional contraband.[1]

Articles conditionally Contraband.

§ 394. There are many articles which are not by their character destined to be made use of in war, but are nevertheless of great value to belligerents for the continuance of the war. Such articles are conditionally contraband, which means that they are contraband when it is clearly apparent that they are intended to be made use of for military or naval purposes. This intention becomes apparent on considering either the destination of the vessel carrying the articles concerned, or the consignee of the articles. If such destination is an enemy fleet, or an enemy port exclusively or mainly used for military or naval equipment, or if the consignee is a contractor for the enemy army and navy, it may justly be presumed that the goods are intended to be made use of for military or naval purposes. What articles belong to this class cannot be decisively laid down.

[1] At the outbreak of the Russo-Japanese War, Russia made no distinction between absolute and conditional contraband, declaring all the articles concerned contraband outright. But on the protests of Great Britain and the United States of America, Russia admitted the distinction, declaring provisions, cotton, and similar articles, only conditional contraband. See below, § 394.

Neither the practice of States nor the opinion of writers agrees upon the matter, and it is in especial controverted[1] whether or not foodstuffs, horses and other beasts of burden, coal and other fuel, money and the like, and cotton can conditionally be declared contraband.

(1) That *foodstuffs* cannot under ordinary circumstances be declared contraband there ought to be no doubt. There are even several[2] writers who emphatically deny that foodstuffs can ever be conditional contraband. But the majority of writers admit that foodstuffs destined for the use of the enemy army or navy may be declared contraband. This is also the practice of Great Britain,[3] the United States of America, and Japan. But France declared in 1885, during her hostilities against China, rice in general as contraband, on the ground of the importance of this article for the Chinese population. And Russia in 1904, during the Russo-Japanese war, declared rice and provisions in general as contraband; on the protest of Great Britain and the United States of America, however, she altered her decision and declared these articles conditional contraband only.

(2) The importance of *horses and other beasts of burden* for cavalry, artillery, and military transport explains their frequently being declared as contraband by belligerents. No argument has any basis against their character as conditional contraband. But they are frequently declared absolute contraband, as, for instance, by article 36 of the United States Naval War Code. Russia, which during the Russo-Japanese War altered her standpoint taken

[1] See Perels, § 45, and Hall, §§ 242–246, who give bird's-eye views of the controversy.

[2] See, for instance, Bluntschli, § 807.

[3] The Jonge Margaretha, 1 Rob. 189.

up at first, and recognised the distinction between absolute and conditional contraband, nevertheless maintained her declaration of horses and beasts of burden as absolute contraband.

(3) Since men-of-war are nowadays steamers, the importance of *coal*, and eventually other fuel for steamers, for waging war on sea is obvious. For this reason, Great Britain has ever since 1854 maintained that coal, if destined for belligerent men-of-war or belligerent naval ports, is contraband. But in 1859 France and Italy did not take up the same standpoint. Russia, although in 1885 she declared that she would never consent to coal being regarded as contraband, declared in 1904 coal, naphtha, alcohol, and every other kind of fuel, absolute contraband. And she adhered to this standpoint, although she was made to recognise the distinction between absolute and conditional contraband.

(4) As regards *money*, unwrought precious metals which may be coined into money, bonds and the like, the mere fact that a neutral is prohibited by his duty of impartiality from granting a loan to a belligerent ought to bring conviction that these articles are contraband if destined for the enemy State or its forces. However, the case seldom happens that these articles are brought by neutral vessels to belligerent ports, since under the modern conditions of trade belligerents can be supplied in other ways with the necessary funds.

(5) As regards *raw cotton*, it is asserted [1] that in 1861, during the Civil War, the United States declared it absolute contraband under quite peculiar circumstances, since it took the place of money sent abroad

[1] See Hall, § 246, p. 690, note 2; Taylor, § 662; Wharton, III. § 373.

for the purpose of paying for vessels, arms, and ammunition. This assertion seems to be based on the following extract from a communication of Mr. Bayard, Secretary of State, to Mr. Muruaga on June 28, 1886, printed by Wharton, III. § 373, p. 438:—

"Cotton was useful as collateral security for loans negotiated abroad by the Confederate States Government, or, as in the present case, was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed by the Confederacy, and its sale interdicted except under regulations established by, or contract with, the Confederate Government. Cotton was thus officially classed among war supplies, and, as such, was liable to be destroyed when found by the Federal troops, or turned to any use which the exigencies of war might dictate. . . . Cotton, in fact, was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining those indispensables of warfare. In International Law there could be no question as to the right of the Federal commanders to seize it as contraband of war, whether they found it on rebel territory or intercepted it on the way to the parties who were to furnish in return material aid in the form of the sinews of war—arms or general supplies."

But this assertion that cotton was declared contraband during the American Civil War would seem to be erroneous. Holland[1] points out:—"It has, indeed, been alleged that cotton was declared to be 'contraband' by the United States in their Civil War. The Federal proclamations will, however, be

[1] See Professor Holland's letter, "Cotton as Contraband of War," in the "Times" of July 2, 1905.

searched in vain for anything of the kind. The mistake is due to an occasional loose employment of the term, as descriptive of articles found by an invader in an enemy's territory, which, although the property of private, and even neutral, individuals, happen to be so useful for the purposes of the war as to be justly confiscated. That this was so will appear from an attentive reading of the case of Mrs. Alexander's cotton, in 1861 (2 Wallace, 404), and of the arguments in the claim made by Messrs. Maza and Larrache against the United States in 1886 (Foreign Relations of United States, 1887)."

Be that as it may, raw cotton cannot under ordinary circumstances be considered absolute contraband. For this reason Great Britain protested when Russia in 1904, during the Russo-Japanese War, declared cotton in general as contraband. Russia altered her standpoint and declared cotton conditional contraband only.[1]

Hostile Destination essential to Contraband.

§ 395. Whatever may be the nature of articles, they are never contraband unless they are destined for the use of a belligerent in war. Arms and ammunition destined for a neutral are as little contraband as other goods with the same destination. As this hostile destination is essential even for articles which are obviously used in war, such hostile destination is all the more important for such articles of ancipitous use as are only conditionally contraband. Thus, for instance, provisions and coal are

[1] According to British practice —see Holland, Prize Law, § 64— the list of conditional contraband comprises :—Provisions and liquors for the consumption of army and navy; money, telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc; materials for the construction of a railway, as iron bars, sleepers, and the like; coal, hay, horses, rosin, tallow, timber. But it is in the prerogative of the Crown to extend or reduce this list during a war according to the requirements of the circumstances.

perfectly innocent and not at all contraband if they are not purposely destined for enemy troops and naval forces, but are destined for use by a neutral. However, the destination of the articles must not be confounded with the destination of the vessel which carries them. For it will be shown [1] that, on the one hand, articles with a hostile destination are considered contraband although the carrying vessel is destined for a neutral port, and that, on the other hand, articles, although they are without a hostile destination, are considered contraband because the carrying vessel is to touch at an intermediate enemy port and is, therefore, destined for such port, although her ultimate destination is a neutral port.

Articles destined for the Use of the Carrying Vessel.

§ 396. Hostile destination being essential for all kinds of articles to be considered contraband, all such articles as are carried by a vessel apparently for her own use are never contraband. Merchantmen frequently carry a gun and some amount of ammunition for the purpose of signalling, and, if they navigate in parts of the sea dangerous on account of piracy, they frequently carry a certain amount of arms and ammunition for defence against an attack by pirates. It will not be difficult either for the searching belligerent man-of-war or for the Prize Court to ascertain whether or not such arms and ammunition are carried *bonâ fide*.

Contraband Vessels.

§ 397. A neutral vessel, whether carrying contraband or not, may be herself contraband. This is the case when she is built or fit for use in war and is on her way to the enemy. Such vessel being equivalent to arms, although she may not yet be fitted with arms, is, of course, absolutely contraband.[2] And it

[1] See below, §§ 399–401. See Twiss, II. § 148, and Holland, Prize Law, § 86.

[2] The Richmond, 5 Rob. 325.

must be specially observed that she need not at all be fit for use as a man-of-war; it suffices that she is fit to be used for the transport of troops and the like.

That a neutral is not obliged by his duty of impartiality to prevent his subjects from supplying a belligerent with vessels except where the vessel concerned is built or fitted out *by order* of a belligerent, is shown above in §§ 334 and 350.[1]

II

Carriage of Contraband

See the literature quoted above at the commencement of § 391.

Carriage of Contraband Penal by the Municipal Law of Belligerents.

§ 398. The guaranteed freedom of commerce making the sale of articles of all kinds to belligerents by subjects of neutrals legitimate, articles of conditional as well as absolute contraband may be supplied by sale to either belligerent by these individuals. And the carriage of such articles by neutral merchantmen on the Open Sea is, as far as International Law is concerned, quite as legitimate as their sale. The carrier of contraband by no means violates an injunction of the Law of Nations. But belligerents have by the Law of Nations the right to prohibit and punish the carriage of contraband by neutral merchantmen, and the carrier of contraband violates, for this reason, an injunction of the belligerent concerned. It is not International Law, but the Municipal Law of the belligerents, which makes carriage of contraband illegitimate and penal.[2] The

[1] See also above, § 321, concerning the sale, during the Russo-Japanese War, of several German liners to Russia.

[2] See above, § 296.

question why the carriage of contraband articles may nevertheless be prohibited and punished by the belligerents, although it is quite legitimate as far as International Law is concerned, can only be answered by a reference to the historical development of the Law of Nations. In contradistinction to former practice, which interdicted all trade between neutrals and the enemy, the principle of freedom of commerce between subjects of neutrals and either belligerent has gradually become universally recognised; but this recognition included from the beginning the right of either belligerent to punish carriage of contraband on the sea. And the reason obviously is the necessity for belligerents in the interest of self-preservation to prevent the import of such articles as may strengthen the enemy, and to confiscate the contraband cargo, and eventually the vessel also, as a deterrent to other vessels.

The present condition of the matter of carriage of contraband[1] is therefore a compromise. In the interest of the generally recognised principle of freedom of commerce between belligerents and subjects of neutrals, International Law does not require neutrals to prevent their subjects from carrying contraband; on the other hand, International Law empowers either belligerent to prohibit and punish carriage of contraband in the same way as it—see above, § 383—empowers either belligerent to prohibit and punish breach of blockade.

Direct Carriage of Contraband.

§ 399. Carriage of contraband commonly occurs where a vessel is engaged in carrying to an enemy port such goods as are contraband when they have a hostile destination. In such cases it matters not

[1] The same applies to blockade-running and carriage of analogous of contraband.

whether the fact that the vessel is destined for an enemy port becomes apparent from her papers, she being bound to such port, or whether she is found at sea sailing on a course for an enemy port, although her papers show her to be bound to a neutral port. And it, further, matters not, according to the practice of Great Britain and the United States of America at least, that she is bound to a neutral port and that the articles concerned are, according to her papers, destined for a neutral port, if only she is to call at an intermediate enemy port or is to meet enemy naval forces at sea in the course of her voyage to the neutral port of destination;[1] for otherwise the door would be open to deceit, and it would always be pretended that goods which a vessel is engaged in carrying to such intermediate enemy places were intended for the neutral port of ultimate destination. For the same reason a vessel carrying such articles as are contraband when they have a hostile destination is considered carrying contraband if her papers show that her destination is dependent upon contingencies under which she may have to call at an enemy port,[2] unless she proves that she has abandoned the intention of eventually calling there.

Circuitous Carriage of Contraband.

§ 400. On occasions a neutral vessel carrying such articles as are contraband if they have a hostile destination is, according to her papers, ostensibly bound to a neutral port, but is intended, after having called and eventually having delivered her cargo there, to carry the same cargo from there to an enemy port. There is, of course, no doubt that such vessels are carrying contraband whilst engaged in carrying the articles concerned from the neutral to the enemy port. But during the American Civil

[1] See Holland, Prize Law, § 69. [2] See Holland, Prize Law, § 70.

War the question arose whether they may already be considered carrying contraband on their way from the port of starting to the neutral port from which they are afterwards to carry the cargo to an enemy port, since they are really intended to carry the cargo from the port of starting to an enemy port, although not directly, but circuitously, on a roundabout way. The American Prize Courts answered the question in the affirmative by applying to the carriage of contraband the principle of *dolus non purgatur circuitu* and the so-called doctrine of continuous voyages.[1] This attitude of the American Prize Courts has called forth protests on the part of many authorities,[2] British as well as foreign, but Great Britain has not protested, and from the attitude of the British Government in the case of the "Bundesrath" and other vessels in 1900 during the South African War it may safely, although indirectly only, be concluded that Great Britain considers the practice of the American Prize Courts correct and just, and that as a belligerent she intends to apply the same principles. This may also be inferred from § 71 of Holland's "Manual of Naval Prize Law," which establishes the rule: "The ostensible destination of a vessel is sometimes a neutral port, while she is in reality intended, after touching,

[1] See above, § 385 (4), where the cases of the "Bermuda" and the "Stephen Hart" are quoted. In all those and the like cases the doctrine of continuous voyages was said to apply as well to carriage of contraband as to breach of blockade.

[2] See, for instance, Hall, § 247. But Phillimore, III. § 227, p. 391, says of the judgments of the Supreme Court of the United States in the cases of the "Bermuda" and the "Peterhoff," that they "contain very valuable and sound expositions of the law, professedly, and for the most part really in harmony with the earlier decisions of English Prize Courts." On the other hand, Phillimore, III. § 298, p. 490, disagrees with the American Courts regarding the application of the doctrine of continuous voyages to breach of blockade, and reprobates the decision in the case of the "Springbok." See also Remy, Théorie de la continuauté du voyage en matière de blocus et de contrebande de guerre (1902), and Fauchille in R.G., IV. (1897), pp. 297–323.

and even landing and colourably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be 'continuous,' and the destination is held to be hostile throughout." And provided that the intention of the vessel is really to carry the cargo circuitously, by a roundabout way, to an enemy port, and provided, further, that a mere suspicion is not held for a proof of such intention, I cannot see why this application of the doctrine of continuous voyages should not be considered reasonable, just, and adequate.

Indirect Carriage of Contraband (Doctrine of Continuous Transports).

§ 401. It also happens in war that neutral vessels carry to neutral ports such articles as are contraband if bound for a hostile destination, the vessel being cognisant or not of the fact that arrangements have been made for the articles to be afterwards brought by land or sea into the hands of the enemy. And the question has arisen whether such vessels on their voyage to the neutral port can be considered carrying contraband of war.[1] Already in 1855, during the Crimean War, the French Conseil-Général des Prises, in condemning the cargo of saltpetre of the Hanoverian neutral vessel "Vrow Houwina," answered the question in the affirmative;[2] but it was not until the

[1] The question is treated with special regard to the case of the "Bundesrath," in two able articles in the Law Quarterly Review, XVII. (1901), under the titles "The Seizure of the Bundesrath" (Mr. I. Dundas White) and "Contraband Goods and Neutral Ports" (Mr. E. L. de Hart). See also Baty, International Law in South Africa (1900), pp. 1–44.

[2] See Calvo, V. § 2767, p. 52. The case of the Swedish neutral vessel "Commercen," which occurred in 1814, and which is frequently quoted with that of the "Vrow Houwina" (1 Wheaton, 382), is not a case of indirect carriage of contraband. The "Commercen" was on her way to Bilbao, in Spain, carrying a cargo of provisions for the English Army in Spain, and she was captured by a privateer commissioned by the United States of America, which was then at war with England. When the case, in 1816, came before Mr. Justice Story, he reprobated the argument that the seizure was not justified because a vessel could not be considered carrying contraband when on her

American Civil War that the question was decided on principle. Since from the British port of Nassau, in the Bahamas, and from other neutral ports near the coast of the Confederate States, goods, first brought to these nearer neutral ports by vessels coming from more distant neutral ports, were carried to the blockaded coasts of the Southern States, Federal cruisers seized several vessels destined and actually on their voyage to Nassau and other neutral ports because all or parts of their cargoes were ultimately destined for the enemy. And the American Courts considered those vessels as carrying contraband, although they were sailing from one neutral port to another, on clear proof that the goods concerned were destined to be transported by land or sea from the neutral port of landing into the enemy territory. The leading cases are those of the "Springbok" and "Peterhoff," which are already mentioned above in § 385 (4), for the Courts found the seizure of these and other vessels justified as well on the ground of carriage of contraband as on the ground of breach of blockade. Thus, another application of the doctrine of continuous voyages came into existence, since vessels whilst sailing between two neutral ports could only be considered to be carrying contraband when the transport first from one neutral port to another and afterwards from the latter to the enemy territory had been regarded as one continuous voyage. This application of the doctrine of continuous voyages is fitly termed "doctrine of continuous transports."

The Case of the "Bundesrath."

§ 402. This application of the doctrine of continuous voyages under the new form of continuous

way to a neutral port, and he asserted that the hostile destination of goods was sufficient to justify the seizure of the vessel.

transports has likewise been condemned by many British and foreign authorities; but here, too, Great Britain did not protest—on the contrary, she has, as was mentioned above in § 385 (4), declined to interfere in favour of the British owners of the vessels and cargoes concerned. And that she really considers the practice of the American Courts just and sound became clearly apparent by her attitude during the South African War. When, in 1900, the "Bundesrath," "Herzog," and "General," German vessels sailing from German neutral ports to the Portuguese neutral port of Lorenzo Marques, in Delagoa Bay, were seized by British cruisers under the suspicion of carrying contraband, Germany demanded their release, maintaining that no carriage of contraband could be said to take place by vessels sailing from one neutral port to another. But Great Britain refused to admit this principle, maintaining that articles ultimately destined for the enemy were contraband, although the vessels carrying them were bound for a neutral port.[1]

There is no doubt that this attitude of the British Government was contrary to the opinion of prominent English[2] writers on International Law. Even the "Manual of Naval Prize Law," edited by Professor Holland[3] in 1888, and "issued by authority of the Lords Commissioners of the Admiralty," reprobates the American practice, for in § 72 it lays down the following rule: ". . . If the destination of the vessel

[1] See Parliamentary Papers, Africa, No. 1 (1900); Correspondence respecting the action of H.M.'s naval authorities with regard to certain foreign vessels.

[2] See, for instance, Hall, § 247, and Twiss in the Law Magazine and Review, XII. (1877), pp. 130–158.

[3] In a letter to the "Times" of January 3, 1900, Professor Holland points out that circumstances had so altered since 1888 that the attitude of the British Government in the case of the "Bundesrath" was quite justified.

be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior destination by transhipment, overland conveyance, or otherwise." And the practice of British Prize Courts seems hitherto to have been in accordance with this rule. In 1798, during war between England and the Netherlands, the neutral ship "Imina,"[1] which had left the neutral port of Dantzig for Amsterdam carrying ship's timber, but on hearing of the blockade of Amsterdam by the British had changed her course for the neutral port of Emden, was seized on her voyage to Emden by a British cruiser, but she was released by Sir William Scott because she had no intention of breaking blockade, and because a vessel could only be considered carrying contraband whilst on a voyage to an enemy port. "The rule respecting contraband, as I have have always understood it, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy port," said Sir William Scott.[2]

Continental support to the Doctrine of Continuous Transports.

§ 403. Although the majority of Continental writers condemn the doctrine of continuous transports, there are several eminent Continental authorities who support it. Thus, Gessner (p. 119) asserts emphatically that the destination of the carrying vessel

[1] 3 Rob. 167.

[2] It is frequently maintained—see Phillimore, III. § 227, pp. 397–403—that in 1864, in the case of *Hobbs* v. *Henning*, Lord Chief Justice Erle repudiated the doctrine of continuous transports, but Professor Westlake shows that this is not the case; see Westlake's Introduction in Takahashi, International Law during the Chino-Japanese War (1899), pp. xx–xxiii, see also Westlake in the Law Quarterly Review, XV. (1899), pp. 23–30. But I cannot see that Westlake is likewise successful in his endeavour to show that Sir William Scott had not asserted the impossibility of contraband between two neutral ports.

is of no importance compared with the destination of the carried goods themselves. Bluntschli, although he condemns in § 835 the American practice regarding breach of blockade committed by a vessel sailing from one neutral port to another, approves in § 813 expressly of the American practice regarding carriage of contraband by a vessel sailing between two neutral ports, yet carrying goods with a hostile destination. Kleen (I. § 95, p. 388) condemns the rule that the neutral destination of the vessel makes the goods appear likewise neutral, and defends seizure in the case of a hostile destination of the goods on a vessel sailing between two neutral ports; he expressly states that such goods are contraband from the moment the carrying vessel leaves the port of loading. Fiore (III. No. 1649) reprobates the theory of continuous voyages as applied by British and American Courts, but he asserts nevertheless that the hostile destination of certain goods carried by a vessel sailing to a neutral port justifies the vessel being regarded as carrying contraband and the seizure thereof. Bonfils (No. 1569) takes up the same standpoint as Bluntschli, admitting the application of the theory of continuous voyages to carriage of contraband, but reprobating its application to breach of blockade. And the Institute of International Law adopted the rule:[1] "La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestable, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale.' Thus this representative body of authorities of all nations has fully

[1] See § 1 of the "Réglementation internationale de la contrebande de guerre," Annuaire, XV. (1896) p. 230.

adopted the American application of the doctrine of continuous voyages to contraband, and thereby recognised the possibility of circuitous as well as indirect carriage of contraband.

And it must be mentioned that the attitude of several Continental States is in favour of the American practice. Thus, according to §§ 4 and 6 of the Prussian Regulations of 1864 regarding Naval Prizes, it is the hostile destination of the goods or the destination of the vessel to an enemy port which makes a vessel appear as carrying contraband and which justifies her seizure. In Sweden the same is valid.[1] Thus, further, an Italian Prize Court during the war with Abyssinia in 1896 justified the seizure in the Red Sea of the Dutch vessel "Doelwijk,"[2] which sailed for the neutral French port of Djibouti, carrying a cargo of arms and ammunition destined for the Abyssinian army and to be transported to Abyssinia after having been landed at Djibouti.

III

Consequences of Carriage of Contraband

See the literature quoted above at the commencement of § 391.

Capture for Carriage of Contraband.

§ 404. It is universally recognised by theory and practice that a vessel carrying contraband may be seized by the cruisers of the belligerent concerned. But seizure is allowed only as long as a vessel is *in delicto*, which commences when she leaves the port of starting and ends when she has deposited the contraband goods, whether with the enemy or otherwise.

[1] See Kleen, I. p. 389, note 2.

[2] See Martens, N.R.G., 2nd ser., XXVIII. p. 66. See also below, § 438.

The rule is, therefore, generally recognised that a vessel which has deposited her contraband cannot be seized on her return voyage. British and American practice admits, however, one exception to this rule—namely, in the case in which a vessel has carried contraband on her outward voyage with simulated and false papers.[1] But no exception is admitted by the practice of other countries. Thus, when in 1879, during war between Peru and Chile, the German vessel "Luxor," after having carried a cargo of arms and ammunition from Monte Video to Valparaiso, was seized in the harbour of Callao, in Peru, and condemned for carrying contraband by the Peruvian Prize Courts, Germany interfered and succeeded in getting the vessel released.

It must be emphasised that seizure for carriage of contraband is only admissible on the Open Sea and in the maritime territorial belt of both belligerents. Seizure within the maritime belt of neutrals would be a violation of neutrality.

Penalty for Carriage of Contraband.

§ 405. Neither in theory nor in practice are rules of the same contents recognised with regard to the penalty of carriage of contraband. In former times the penalty was frequently confiscation not only of the contraband cargo itself, but also of all other parts of the cargo, together with the vessel. Only France made an exception, since according to an *ordonnance* of 1584 she did not even confiscate the contraband goods themselves, but only seized them against payment of their value, and it was not until 1681 that an *ordonnance* proclaimed confiscation of

[1] The Nancy, 3 Rob. 122; the Margaret, 1 Acton, 333. See Holland, Prize Law, § 80. Wheaton, I. § 506, note 2, condemns this practice; Hall, § 247, p. 696, calls it "undoubtedly severe;" Halleck, II. p. 220, defends it. See also Calvo, V. §§ 2756–2758.

contraband, but with exclusion of the vessel and the innocent part of the cargo.[1] During the seventeenth century this distinction between contraband on the one hand, and, on the other, the innocent goods and the vessel was clearly recognised by Zouche and Bynkershoek, and confiscation of the contraband only became more and more the rule, certain cases excepted. During the eighteenth century the right to confiscate contraband was frequently contested, and it is remarkable for the change of the attitude of some States that by Article 13 of the Treaty of Friendship and Commerce [2] concluded in 1785 between Prussia and the United States of America all confiscation was abolished. This article provided that the belligerent should have the right to stop vessels carrying contraband and to detain them for such length of time as might be necessary to prevent possible damage by them, but such detained vessels should be paid compensation for the arrest imposed upon them. It further provided that the belligerent could seize all contraband against payment of its full value, and that, if the captain of a vessel stopped for carrying contraband should deliver up all contraband, the vessel should at once be set free. I doubt whether any other treaty of the same kind was entered into by either Prussia or the United States.[3]

[1] See Wheaton, Histoire des Progrès du Droit des gens en Europe (1841), p. 82.

[2] Martens, R.I., IV. 42. The stipulation was renewed by article 12 of the Treaty of Commerce and Navigation between the two States concluded in 1828; Martens, N.R., VII. 619.

[3] Article 12 of the Treaty of Commerce, between the United States of America and Italy, signed at Florence on February 26, 1871—see Martens, N.R.G., 2nd ser. I. p. 57—stipulates immunity from seizure of such private property only as does not consist of contraband: "The high contracting parties agree that, in the unfortunate event of war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by

And it is certain that, if any rule regarding penalty for carriage of contraband is generally recognised at all, it is the rule that contraband goods can be confiscated.[1] But there always remains the difficulty that it is controverted what articles are contraband, and that the practice of States varies much regarding the question how far the vessel herself and innocent cargo carried by her can be confiscated. For beyond the rule that absolute contraband can be confiscated, there is no unanimity regarding the fate of the vessel and the innocent part of the cargo. Great Britain and the United States of America confiscate the vessel when the owner of the contraband is also the owner of the vessel; they also confiscate such part of the innocent cargo as belongs to the owner of the contraband goods; they, lastly, confiscate the vessel, although her owner is not the owner of the contraband, provided he knew of the fact that his vessel was carrying contraband, or provided the vessel sailed with false or simulated papers for the purpose of carrying contraband.[2] Some States allow such vessel carrying contraband as is not herself liable to confiscation to proceed with her voyage on delivery of her contraband goods to the seizing cruiser,[3] but Great Britain[4] and other States insist upon the vessel being brought before a Prize Court in every case.

Pre-emption of Conditional Contraband.

§ 406. Those States which make a distinction

the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party." See above, § 178.

[1] But if a vessel carrying contraband sailed before the outbreak of war and is seized before she acquired knowledge of the war, confiscation ought not to take place. See Perels, § 46, p. 252.

[2] See Holland, Prize Law, §§ 82–87.

[3] See Calvo, V. § 2779.

[4] See Holland, Prize Law, § 81.

between absolute and conditional contraband regularly confiscate neither the conditional contraband nor the vessel that carries it, but they seize the former and pay for it. According to British practice,[1] freight is paid to the vessel, and for the conditional contraband the usual compensation is the cost price *plus* 10 per cent. profit. States acting thus maintain a right to confiscate conditional contraband but they exercise pre-emption in mitigation of such right. Those Continental writers who refuse to recognise the existence of conditional contraband deny, consequently, that there is a right to confiscate articles not absolutely contraband, but they maintain that every belligerent has, according to the so-called right of angary,[2] a right to stop all such neutral vessels as carry provisions and other goods with a hostile destination of which he can make use and to seize such goods against payment of their full value.

The Institute of International Law, whose rules regarding contraband, adopted at its meeting at Venice in 1896, restrict contraband to arms, ammunition, articles of military equipment, vessels fitted for naval operations, and instruments for the immediate fabrication of ammunition, contain a compromise regarding articles of ancipitous use. Although these rules say that those articles cannot be considered contraband, they give nevertheless the choice to a belligerent either of exercising pre-emption or of seizing and temporarily detaining them against payment of indemnities.[3]

[1] See Holland, Prize Law, § 84. Great Britain likewise exercises pre-emption instead of confiscation with regard to such absolute contraband as is in an unmanufactured condition and is at the same time the produce of the country exporting it.

[2] See above, § 367.

[3] It is of value to print here the "Réglementation internationale de la contrebande de

guerre" adopted by the Institute of International Law (Annuaire, XV. [1896] p. 230):—

§ 1. Sont articles de contrebande de guerre: (1) les armes de toute nature; (2) les munitions de guerre et les explosifs; (3) le matériel militaire (objets d'équipement, affûts, uniformes, etc.); (4) les vaisseaux équipés pour la guerre; (5) les instruments spécialement faits pour la fabrication immédiate des munitions de guerre; lorsque ces divers objets sont transportés par mer pour le compte ou à la destination d'un belligérant.

La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestable, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale.

§ 2. Sous la dénomination de *munitions de guerre* doivent être compris les objets qui, pour servir immédiatement à la guerre, n'exigent qu'une simple réunion ou juxtaposition.

§ 3. Un objet ne saurait être qualifié de contrebande à raison de la seule intention de l'employer à aider ou favoriser un ennemi, ni par cela seul qu'il pourrait être, dans un but militaire, utile à un ennemi ou utilisé par lui, ou qu'il est destiné à son usage.

§ 4. Sont et demeurent abolies les prétendues contrebandes désignées sous les noms soit de contrebande *relative*, concernant des articles (*usus ancipitis*) susceptibles d'être utilisés par un belligérant dans un but militaire, mais dont l'usage est essentiellement pacifique, soit de contrebande *accidentelle*, quand lesdits articles ne servent spécialement aux buts militaires que dans une circonstance particulière.

§ 5. Néanmoins le belligérant a, à son choix et à charge d'une équitable indemnité, le droit de séquestre ou de préemption quant aux objets qui, en chemin vers un port de son adversaire, peuvent également servir à l'usage de la guerre et à des usages pacifiques.

. . . . . .

§ 9. En cas de saisies ou répressions non justifiées pour cause de contrebande ou de transport, l'Etat du capteur sera tenu aux dommages-intérêts et à la restitution des objets.

§ 10. Un transport parti avant la déclaration de la guerre et sans connaissance obligée de son imminence n'est pas punissable.

CHAPTER V

ANALOGOUS OF CONTRABAND

I

Carriage of Persons and Despatches for the Enemy

Hall, §§ 248-253—Lawrence, §§ 282-284—Phillimore, III. §§ 271-274—Halleck, II. pp. 289-301—Taylor, §§ 667-673—Walker, § 72—Wharton, III. § 374—Wheaton, §§ 502-504 and Dana's note No. 228—Bluntschli, §§ 815-818—Heffter, § 161A—Geffcken in Holtzendorff, IV. pp. 731-738—Ullmann, § 165—Bonfils, Nos. 1584-1588—Despagnet, No. 691—Rivier, II. pp. 388-391—Calvo, V. §§ 2796-2820—Fiore, III. Nos. 1602-1605—Martens, II. § 136—Kleen, I. §§ 103-106—Boeck, Nos. 660-669—Pillet, p. 330—Gessner, pp. 99-111—Perels, § 47—Testa, p. 212—Dupuis, Nos. 231-238—Holland, Prize Law, §§ 88-105—U.S. Naval War Code, articles 16 and 20—Hautefeuille, II. pp. 173-188—Ortolan, II. pp. 209-213—Mountague Bernard, "Neutrality of Great Britain during the American Civil War" (1870), pp. 187-205—Marquardsen, "Der Trent-Fall" (1862), pp. 58-71—Hirsch, "Kriegskrontrebande und verbotene Transporte in Kriegszeiten" (1897), pp. 42-55—Takahashi, "International Law during the Chino-Japanese War" (1899), pp. 52-72—Vetzel, "De la contrebande par analogie en droit maritime internationale" (1901).—See also the monographs quoted above at the commencement of § 391.

Carriage of certain Enemy Persons and Despatches analogous of Contraband.

§ 407. Carriage of certain persons and despatches for the enemy is often confounded with carriage of contraband. Since, however, contraband consists of certain goods only, and never of persons or despatches, a vessel carrying persons and despatches for the enemy ought not to be considered carrying contraband. And there is another important difference between the two. Carriage of contraband need not

necessarily, and in most cases actually does not, take place in the direct service of the enemy. On the other hand, carriage of persons and despatches for the enemy always takes place in the direct service of the enemy, and, consequently, represents a much more intensive assistance of, and a much more intimate connection with, the enemy than carriage of contraband. Taking this into consideration, some writers [1] entirely severed the treatment of contraband and of carriage of persons and despatches for the enemy, and they treat of the maritime transport of persons and despatches for the enemy under the head of "un-neutral services." But although this distinct treatment is certainly desirable, the term "un-neutral services" is misleading. Moreover, it is a fact that in practice maritime transport for the enemy is treated in analogy with, although not as, carriage of contraband. The term "analogous of contraband" had therefore better be made use of.[2]

Carriage of Persons for the Enemy.

§ 408. Either belligerent can punish neutral vessels for carrying certain persons to and from the enemy territory. Such persons are, firstly and chiefly, members of the armed forces who are either brought to the region of war, where they are intended to take part in the fighting, or are carried away from the region of war for any purpose.[3] Such persons are, secondly, individuals who are not yet, but will become members of the armed forces as soon as they have reached the place of their destination. Such persons

[1] See, for instance, Lawrence, § 282, and Taylor, § 667.

[2] Although—see above, §§ 173–174—prevention of carriage of analogous of contraband is a means of sea-warfare, it chiefly concerns neutral commerce, and is, therefore, more conveniently treated together with neutrality.

[3] But according to article 6 of the Hague "Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention," neutral merchantmen cannot be captured for taking on board sick, wounded, or shipwrecked marines of the enemy. See above, § 208.

are, thirdly and lastly, non-military individuals in the service of the enemy either of such a prominent position that they can be made prisoners of war, or going abroad as agents for the purpose of fostering the cause of the enemy by buying arms and ammunition, by endeavouring to procure the intervention of a third Power, or by other means. Thus, for instance, if the head of a belligerent State or one of his Cabinet Ministers flees the country to avoid captivity, the neutral vessel that carries him off may be punished, as may also the vessel carrying an agent of the enemy sent abroad to negotiate a loan, and the like.

However, the mere fact that enemy persons are on board of a neutral vessel does not in itself prove that these persons are carried by the vessel *for the enemy and in his service.* This is the case only if either the vessel knows of the character of the persons and nevertheless carries them, thereby acting in the service of the enemy, or if the vessel is directly hired by the enemy for the purpose of transport of the individuals concerned. Thus, for instance, if able-bodied men book their passage on a neutral vessel to an enemy port with the secret intention of enlisting in the forces of the enemy, the vessel cannot be considered carrying persons for the enemy; but she can be so considered if an agent of the enemy openly books their passage. Thus, further, if the fugitive head of the enemy State books his passage under a false name, and conceals his identity from the vessel, she cannot be considered carrying a person for the enemy; but she can be so considered if she knows whom she is carrying, because she knows then that she is acting in the service of the enemy. As regards a vessel directly hired by the enemy, there

can be no doubt that she is acting in the service of the enemy. Thus the American vessel "Orozembo"[1] was in 1807, during war between England and the Netherlands, captured and condemned, because, although chartered by a merchant in Lisbon ostensibly to sail in ballast to Macao and to take from there a cargo to America, she received by order of the charterer three Dutch officers and two Dutch civil servants, and sailed, not to Macao, but to Batavia. And the American vessel "Friendship"[2] was likewise in 1807, during war between England and France, captured and condemned, because she was hired by the French Government to carry ninety shipwrecked officers and sailors home to a French port.

According to British practice a neutral vessel is considered as carrying persons in the service of the enemy even if she was, through the application of force, constrained by the enemy to carry the persons or if she was in *bonâ-fide* ignorance of her passengers. Thus, in 1802, during war between Great Britain and France, the Swedish vessel "Carolina"[3] was condemned by Sir William Scott for having carried French troops from Egypt to Italy, although the master endeavoured to prove that the vessel was obliged by force to render the transport service. And the above-mentioned vessel "Orozembo" was condemned by Sir William Scott, although her master was ignorant of the service for the enemy on which he was engaged: ". . . In cases of *bonâ-fide* ignorance there may be no actual delinquency; but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from

[1] 6 Rob. 430. [2] 6 Rob. 420.
[3] 4 Rob. 256.

being done, or at least repeated, by enforcing the penalty of confiscation," said Sir William Scott.[1]

Carriage of Diplomatic Persons for the Enemy (Case of the "Trent.")

§ 409. It must be specially observed that diplomatic agents sent by the enemy to a neutral State make an exception to the rule that neutral vessels may be punished for carrying agents sent by the enemy. The reason is that neutrals have, as shown above in § 319, a right to demand that their intercourse with either belligerent shall not be suppressed, and that the sending and receiving of diplomatic agents is necessary for such intercourse.[2] The importance of this exception became apparent during the Civil War in America. On November 8, 1861, the Federal cruiser "San Jacinto" stopped the British mail steamer "Trent" on her voyage from Havana to the British port of Nassau, in the Bahamas, forcibly took off Messrs. Mason and Slidell, together with their secretaries, political agents sent by the Confederate States to Great Britain and France, and then let the vessel continue her voyage. Great Britain demanded their immediate release, and the United States at once granted this, although the ground on which release was granted was not identical with the ground on which release was demanded. The Government of the United States maintained that the removal of these men from the vessel without bringing her before a Prize Court for trial was irregular, and, therefore,

[1] See Phillimore, III. § 274, and Holland, Prize Law, §§ 90–91. Hall, § 249, p. 700, note 2, reprobates the British practice. During the Russo-Japanese War only one case of condemnation of a neutral vessel for carrying persons for the enemy is recorded, that of the "Nigretia," a vessel which endeavoured to carry into Vladivostock the escaped captain and lieutenant of the Russian destroyer "Ratzoporni"; see Holland, Neutral Duties in a Maritime War, as illustrated by Recent Events (1905), p. 12.

[2] This, however, does not prevent a belligerent from capturing and retaining as prisoner of war such diplomatic envoy of the enemy as is found on his own or on enemy territory or on his own or on enemy vessels. See above, § 117, and vol. I. § 398.

not justified, whereas release was demanded on the ground that a neutral vessel could not be prevented from carrying diplomatic agents sent by the enemy to neutrals. Now, diplomatic agents in the proper sense of the term these gentlemen were not, because, although they were sent by the Confederate States, the latter were not recognised as such, but only as a belligerent Power.[1] Yet these gentlemen were political agents of a quasi-diplomatic character, and the standpoint of Great Britain was for this reason perhaps correct. The fact that the Governments of France, Austria, and Prussia protested through their diplomatic envoys in Washington shows at least that neutral vessels may carry unhindered diplomatic agents sent by the enemy to neutrals, however doubtful it may be whether the same is valid regarding agents with a quasi-diplomatic character.[2]

Carriage of Despatches for the Enemy.

§ 410. Either belligerent can punish neutral merchantmen for carrying political despatches from or to the enemy, and especially such as are in relation to the war. But to this rule there is an exception, on the ground that neutrals have a right to demand that their intercourse with either belligerent be not suppressed. A neutral vessel cannot be punished for carrying despatches from the enemy to neutral Governments, and *vice versâ*,[3] and, further, despatches from the enemy Government to its diplomatic agents and consuls abroad in neutral States and *vice versâ*.[4] But it must be specially observed that despatches

[1] That insurgents who are recognised as a belligerent Power can send political but not diplomatic agents was shown above, vol. I. § 362.

[2] See Parliamentary Papers, 1862, North America, N. 5; Marquardsen, Der Trent Fall (1862); Wharton, § 374; Phillimore, II. §§ 130–130A; Mountague Bernard, Neutrality of Great Britain during the American Civil War (1870), pp. 187–205; Harris, The Trent Affair (1896).

[3] The Caroline, 6 Rob. 461.

[4] The Madison, Edwards, 224.

from the enemy Government to political agents abroad without diplomatic character, and *vice versâ*, are not privileged, nor are despatches between a belligerent and his ally.

However, the mere fact that a neutral vessel has political despatches to or from the enemy on board does not by itself prove that she is carrying them *for and in the service of the enemy*. Just as in the case of certain enemy persons on board, so in the case of despatches, the vessel is only considered carrying them in the service of the enemy if either she knew of their character and has nevertheless taken them on board, or she was directly hired for the purpose of carrying them. Thus, the American vessel "Rapid," [1] which was captured in 1810 during the war between Great Britain and the Netherlands, on her voyage from New York to Tonningen, for having on board a despatch for a Cabinet Minister of the Netherlands hidden under a cover addressed to a merchant at Tonningen, was released by the Prize Court. On the other hand, the "Atalanta," [2] which carried despatches in a tea chest hidden in the trunk of a supercargo, was condemned.[3]

Several writers [4] assert an exception to the rule in favour of packets of a regular mail line and of vessels of a similar kind which have, according to International conventions and municipal regulations, to accept for transport all letters and parcels delivered to them by the post offices of the ports at which they

[1] Edwards, 228.

[2] 6 Rob. 440.

[3] British practice seems unsettled on the question whether the vessel must know of the character of the despatch which she is carrying. In spite of the case of the "Rapid," quoted above, Holland, Prize Law, § 100, maintains that ignorance of the master of the vessel is no excuse, and Phillimore, III. § 272, seems to be of the same opinion.

[4] See, for instance, Calvo, V. § 2808, and Hall, § 252.

call. But I am not sure that a rule regarding this exception is universally recognised by custom.[1]

II

Consequences of Carriage of Persons and Despatches for the Enemy

See the literature quoted above at the commencement of § 407.

Capture for carrying Persons and Despatches for the Enemy.

§ 411. It is generally recognised by theory and practice that a neutral vessel carrying persons and despatches for the enemy may be captured on the Open Sea and in the territorial maritime belt of either belligerent. Here, too, capture is allowed only as long as the vessel is *in delicto*,[2] that is, during the time from her departure with the persons or despatches up to the moment when she has brought them to the enemy. No seizure is, therefore, admissible on the return voyage. It must be specially observed that mail-steamers are on principle not exempt from capture for carriage of analogous of contraband. Nor are in strict law mail-bags of such steamers exempt from search in case the vessels are searched. But there is a tendency to create an alteration of the strict law. Thus, France, in 1870, during the Franco-German War, ordered her officers not to search the mail-bags of neutral mail-boats provided these vessels had an agent of the flag-State on board who asserted that no enemy despatches were in the bag. And § 17 of the "Règlement International des Prises maritimes," adopted by the Institute of International Law

[1] See below, § 411.

[2] Whether those Prize Courts which apply the doctrines of continuous voyages and of continuous transports to the carriage of contraband would apply them likewise to the carriage of analogous of contraband, may be doubted.

at its meeting at Heidelberg in 1887,[1] prohibits even visit to a neutral mail-boat if an agent of the flag-State is on board who declares in writing that no contraband, enemy troops, and enemy despatches are on board. During the American Civil War the United States, following a suggestion of Great Britain, ordered her officers in the case of the capture of such vessels as carried mail-bags not to open the latter, but to forward them to their address.[2] All these examples show that there is a tendency on the part of belligerents to pay a certain consideration to mail-bags, in spite of the rule in strict law that these bags are not privileged. But that this tendency has not yet altered the law is proved by the fact that during the Russo-Japanese War, on July 15, 1904, the Russian cruiser "Smolensk" stopped the German mail steamer "Prinz Heinrich" in the Red Sea and seized and examined her mail bags.[3]

Penalty for carrying Persons and Despatches for the Enemy.

§ 412. It is generally recognised that a neutral vessel captured for carriage of persons or despatches in the service of the enemy may be confiscated. Moreover, according to British[4] practice, such part of the cargo as belongs to the owner of the vessel is likewise confiscated.[5] There is no doubt that, if the vessel is not found guilty of carrying persons or despatches in the service of the enemy, and is, therefore, not condemned, the Government of the captor can nevertheless retain the persons as prisoners of war and confiscate the despatches, provided the

[1] See Annuaire, IX. (1887-88), p. 218.

[2] See Mountague Bernard, Neutrality of Great Britain during the American Civil War (1870), pp. 313-323.

[3] See Lawrence, War, p. 195. As regards the irregular character of the "Smolensk," see above, § 84.

[4] The Friendship, 6 Rob. 420; the Atalanta, 6 Rob. 440. See Holland, Prize Law, §§ 95 and 105.

[5] See, however, the Hope, 6 Rob. 463, note.

persons and despatches are of such character at all as to make a vessel cognisant of this character liable to punishment for transporting them for and in the service of the enemy.

Seizure of Enemy Persons and Despatches without seizing the Vessel.

§ 413. Whenever a neutral vessel is stopped for carrying persons or despatches in the service of the enemy, these persons and despatches cannot, at least according to British[1] and American practice, be seized unless the vessel is seized at the same time for the purpose of bringing her before a Prize Court. The release of Messrs. Mason and Slidell, forcibly taken off the "Trent" whilst the ship was allowed to continue her voyage, was based by the United States[2] on the fact that the seizure of these men without seizure of the vessel was illegal. Some writers,[3] however, maintain that a mail-boat carrying enemy despatches ought not to be seized, but ought to be stopped for the purpose of taking out the despatches, and then be allowed to continue her voyage.

Quite different from the case of seizure of such enemy persons and despatches as a vessel may not carry unpunished in the service of the enemy is the case[4] where a vessel has such enemy persons and despatches on board as she is allowed to carry, but whom a belligerent believes it to be necessary in the interest of self-preservation to seize. Since necessity in the interest of self-preservation is, according to International Law, an excuse[5] for an illegal act, a belligerent can seize such persons and despatches, provided that such seizure is not only desirable, but absolutely necessary[6] in the interest of self-preservation,

[1] See Holland, Prize Law, § 104.
[2] See above, § 409.
[3] See, for instance, Rivier, II. p. 389, and Ullmann, § 165.
[4] See Hall, § 253; Rivier, II. p. 390.
[5] See above, vol. I. § 129.
[6] See above, vol. I. § 130.

as, for instance, in the case where an Ambassador of the enemy on board a neutral vessel is on the way to submit to a neutral a draft treaty of alliance injurious to the other belligerent.[1]

[1] It is of value to print here the rules of the Institute of International Law concerning analogous of contraband. They are rules 6-8 of the "Réglementation internationale de la contrebande de guerre," adopted in Venice in 1896. See Annuaire, XV. (1896) p. 230 :—

§ 6. Il est défendu d'attaquer ou empêcher le transport de diplomates ou courriers diplomatiques : 1° neutres ; 2° accrédités auprès de gouvernements neutres ; 3° naviguant sous pavillons neutres entre des ports neutres ou entre un port neutre et le port d'un belligérant.

Au contraire, le transport des diplomates d'un ennemi accrédités auprès de son allié est, sauf le trafic régulier et ordinaire, interdit : 1° sur les territoires et eaux des belligérants ; 2° entre leurs possessions ; 3° entre les belligérants alliés.

§ 7. Sont interdits les transports de troupes, militaires ou agents de guerre d'un ennemi : 1° dans les eaux des belligérants ; 2° entre leurs autorités, ports, possessions, armées ou flottes ; 3° lorsque le transport se fait pour le compte ou par l'ordre ou le mandat d'un ennemi ; ou bien pour lui amener soit des agents avec une commission pour les opérations de la guerre, soit des militaires étant déjà à son service ou des troupes auxiliaires ou enrôlées contrairement à la neutralité,—entre ports neutres, entre eaux d'un neutre et ceux d'un belligérant, d'un point neutre à l'armée ou la flotte d'un belligérant.

L'interdiction ne s'étend pas au transport des particuliers qui ne sont pas encore au service militaire d'un belligérant, lors même qu'ils auraient l'intention d'y entrer, ou qui font le trajet comme simples voyageurs sans connexité manifeste avec le service militaire.

§ 8. Entre deux autorités d'un ennemi, qui se trouvent sur quelque territoire ou navire lui appartenant ou occupé par lui, est interdit, sauf le trafic régulier et ordinaire, le transport de ses dépêches (communications officielles entre autorités officielles).

L'interdiction ne s'étend pas aux transports soit entre ports neutres soit en provenance ou à destination de quelque territoire ou autorité neutre.

CHAPTER VI

VISITATION, CAPTURE, AND TRIAL OF NEUTRAL VESSELS

I

VISITATION

Vattel, III. § 114—Hall, §§ 270-276—Lawrence, pp. 210, 211, 268—Manning, pp. 433-460—Phillimore, III. §§ 322-344—Twiss, II. §§ 91-97—Halleck, II. pp. 255-271—Taylor, §§ 685-689—Wharton, III. §§ 325 and 346—Wheaton, §§ 524-537—Bluntschli, §§ 819-826—Heffter, §§ 167-171—Geffcken in Holtzendorff, IV. pp. 773-781—Klüber, §§ 293-294—G. F. Martens, II. §§ 317 and 321—Ullmann, § 168—Bonfils, Nos. 1674-1675—Despagnet, Nos. 693-695—Rivier, II. pp. 423-426—Calvo, V. §§ 2939-2991—Fiore, III. Nos. 1630-1641—Martens, II. § 137—Kleen, II. §§ 185-199, 209—Gessner, pp. 278-332—Boeck, Nos. 767-769—Dupuis, Nos. 239-252—Perels, §§ 52-55—Testa, pp. 230-242—Ortolan, II. pp. 214-245—Hautefeuille, III. pp. 1-299—Holland, Prize Law, §§ 1-17, 155-230—U.S. Naval War Code, articles 30-33—Schlegel, "Sur la visite des vaisseaux neutres sous convoi" (1800)—Mirbach, "Die völkerrechtlichen Grundsätze des Durchsuchungsrechts zur See" (1903)—Loewenthal, "Das Untersuchungsrecht des internationalen Seerechts im Krieg und Frieden" (1905)—Duboc in R.G., IV. (1897), pp. 382-403.—See also the monographs quoted above at the commencement of § 391, and Bulmerincq's articles on "Le droit des prises maritimes" in R.I., X-XIII. (1878-1881).

Conception of Right of Visitation.

§ 414. Right of visitation [1] is the right of belligerents to visit and eventually search neutral merchantmen for the purpose of ascertaining whether these

[1] It must be borne in mind that this right of visitation is not an independent right but is involved in the right of either belligerent—see above, § 314—to punish neutral vessels breaking blockade and carrying contraband and analogous of contraband.

vessels really belong to the merchant marine of neutrals, and, if this is found to be the case, whether they are attempting to break a blockade, or whether they carry contraband or analogous of contraband or public enemy property. The right of visit and search is already mentioned in the *Consolato del Mare*, and although it has often [1] been contested, its *raison d'être* is so obvious that it is now generally recognised in theory and universally in practice. It is indeed the only means for belligerents to ascertain whether neutral merchantmen intend to bring assistance to the enemy and to render him services of maritime transport.[2]

Right of Visitation by whom, when, and where exercised.

§ 415. The right of visit and search can be exercised by all warships [3] of belligerents. But since it is a belligerent right, it can, of course, only be exercised after the outbreak of war and before the end of war. The right of visitation on the part of men-of-war of all nations in time of peace in a case of suspicion of piracy—see above, vol. I. § 266 (2)—has nothing to do with the right of visit and search on the part of belligerents. And since an armistice does not bring war to an end, and since, on the other hand, the exercise of the right of visitation is not an act of warfare, this right can be exercised during the time of a partial as well as of a general armistice.[4] The

[1] See, for instance, Hübner, De la saisie des bâtiments neutres, (1759), I. p. 227.

[2] Attention should be drawn to the "Règlement International des prises maritimes," adopted at Heidelberg in 1887 by the Institute of International Law; §§ 1–29 regulate visit and search. See Annuaire, IX. (1888), p. 202.

[3] It should be mentioned that privateers can also exercise the right of visit and search. But since even such States as have not acceded to the Declaration of Paris in practice no longer issue Letters of Marque, such a case will hardly occur.

[4] But this is not universally recognised. Thus, Hautefeuille, III. p. 91, maintains that during a general armistice the right of visitation cannot be exercised, and § 5 of the "Règlement International des prises maritimes" of the Institute of International

region where the right can be exercised is the maritime territorial belt of either belligerent, and, further, the Open Sea, but not the maritime territorial belt of neutrals. Whether the part of the Open Sea in which a belligerent man-of-war meets with a neutral merchantman is near or far away from that part of the world where actually hostilities are taking place matters not at all as long as there is suspicion against the vessel. The question whether the men-of-war of a belligerent can exercise the right of visitation in the maritime territorial belt of an ally is one between the latter and the belligerent exclusively, provided such an ally is already a belligerent.

Only Private Vessels can be visited.

§ 416. During the nineteenth century it has become universally recognised that neutral men-of-war are not objects of the right of visit and search of belligerents.[1] And the same is valid regarding public neutral vessels which sail in the service of armed forces, such as transport vessels for instance. Doubt exists as to the position of public neutral vessels which do not sail in the service of armed forces, but, such as mail-boats belonging to a neutral State for instance, sail for other purposes. It is asserted[2] that, if they are commanded by an officer of the Navy, they must be treated in the same way as men-of-war, but that it is desirable to ask the commanders to give their word of honour assuring the absence of contraband and analogous of contraband.

Vessels under Convoy.

§ 417. Sweden in 1653, during war between

Law takes up the same attitude. It ought, likewise, to be mentioned that in strict law the right of visit and search can be exercised even after the conclusion of peace before the treaty of peace is ratified. But the above-mentioned § 5 of the "Règlement international des prises maritimes" declares this right to cease "avec les préliminaires de le paix." See below, § 436.

[1] In former times Great Britain tried to extend visitation to neutral men-of-war. See Manning, p. 455.

[2] See, for instance, Gessner, p. 297, and Perels, § 52, IV.

Great Britain and the Netherlands, claimed that the belligerents ought to waive their right of visitation over Swedish merchantmen if the latter sailed under the convoy of a Swedish man-of-war whose commander asserted the absence of contraband on board the convoyed vessels. The Peace of Westminster in 1654 brought this war to an end, and in 1756 the Netherlands, now neutral, claimed the right of convoy. But it was not before the last quarter of the eighteenth century that the right of convoy was more and more insisted upon by Continental neutrals. During the American War of Independence in 1780, the Netherlands again claimed that right, and when they themselves in 1781 waged war against Great Britain, they ordered their men-of-war and privateers to respect the right of convoy. Between 1780 and 1800 treaties were concluded, in which Russia, Austria, Prussia, Denmark, Sweden, France, the United States of America, and other States recognised that right. But Great Britain always refused to recognise it, and in July 1800 the action of a British squadron in capturing a Danish man-of-war and her convoy of six merchantmen for resistance to visitation called the Second Armed Neutrality into existence.[1] Yet Great Britain still resisted, and by Article 4 of the "Maritime Convention" of St. Petersburg of June 17, 1801, she conceded to Russia only that vessels under convoy should not be visited by privateers. During the nineteenth century more and more treaties stipulating the right of convoy were concluded, so that it may be maintained that this right is now pretty generally[2] recognised. But Great

[1] See above, § 290.

[2] U. S. Naval War Code, article 30, recognises it likewise, in conformity with the constant practice of the United States in the past.

Britain has never altered her attitude, and, since the Declaration of Paris of 1856 does not mention convoy at all, the recognition of the right of convoy cannot be enforced upon Great Britain against her will.

No Universal Rules regarding Mode of Visitation.

§ 418. There are no rules of International Law which lay down all the details of the formalities of the mode of visitation. A great many treaties regulate them as between the parties, and all maritime nations have given instructions to their men-of-war regarding these formalities. Thereby uniform formalities are practised with regard to many points, but regarding others the practice of different States differs. Article 17 of the Peace Treaty of the Pyrenees of 1659 has served as a model of many of the mentioned treaties regulating the formalities of visitation: "Les navires d'Espagne, pour éviter tout désordre, n'approcheront pas de plus près les Français que la portée du canon, et pourront envoyer leur petite barque ou chaloupe à bord des navires français et faire entrer dedans deux ou trois hommes seulement, à qui seront montrés les passeports par le maître du navire français, par lesquels il puisse apparoir, non seulement de la charge, mais aussi du lieu de sa demeure et résidence, et du nom tant du maître ou patron que du navire même, afin que, par ces deux moyens, on puisse connaître, s'il porte des marchandises de contrebande; et qu'il apparaisse suffisamment tant de la qualité du dit navire que de son maître ou patron; auxquelles passeports on devra donner entière foi et créance."

Stopping of Vessels for the Purpose of Visitation.

§ 419. A man-of-war which wishes to visit a neutral vessel must stop her or make her bring to. Although the chasing of vessels may take place under false colours, the right colours must be shown

when vessels are stopped.[1] The order for stopping can be given[2] by hailing or by firing one or two blank cartridges from the so-called affirming gun, and, if necessary, by firing a shot across the bows of the vessel. If nevertheless the vessel does not bring to, the man-of-war is justified in using force to compel her to bring to. Once the vessel has been brought to, the man-of-war brings to on her part, keeping a reasonable distance. With regard to the width of this distance, treaties very often stipulate either the range of a cannon shot or half such width or even a range beyond a cannon shot; but all this is totally impracticable.[3] The distance must vary according to the requirements of the case, and according to wind and weather.

Visit.

§ 420. The vessel, having been stopped or brought to, is visited[4] by one or two officers sent in a boat from the man-of-war. These officers examine the papers of the vessel to ascertain her nationality, the character of her cargo and passengers, and, lastly, the ports from and to which she is sailing. Instead of visiting the merchantman and inspecting her papers on board, the practice is followed, by the men-of-war of some States, of summoning the master of the merchantman with his papers on board the former and examining the papers there.

If everything is found in order and there is no suspicion of fraud, the vessel is allowed to continue her course, a memorandum of the visit having been entered in her log-book. On the other hand, if the inspection of the papers shows that the vessel is carrying contraband or analogous of contraband,

[1] See above, § 211.
[2] See above, vol. I. § 268.
[3] See Ortolan, II. p. 220, and Perels, § 53, pp. 284, 285.
[4] See above, vol. I. § 268, and Holland, Prize Law, §§ 195–216.

or that she is for another reason liable to capture, she is at once seized. But it may be that, although ostensibly everything is in order, there is nevertheless grave suspicion of fraud against the vessel. In such case she may be searched.

Search.

§ 421. Search is effected[1] by one or two officers, and eventually a few men, in presence of the master of the vessel. Care must be taken not to damage the vessel or the cargo, and no force whatever must be applied. No lock must be forcibly broken open by the search party, but the master is to be required to unlock it. If he fails to comply with the demand he is not to be forced thereto, since the master's refusal to assist the search in general, or that of a locked part of the vessel or of a locked box in particular, is already sufficient cause for seizing the vessel. Search being completed, everything removed has to be replaced with care. If the search has satisfied the searching officers and dispelled all suspicion, a memorandum is entered in the log-book of the vessel, and she is allowed to continue her voyage. On the other hand, if search brought contraband or another cause for capture to light, the vessel is seized. But since search on the sea can never take place so thoroughly as in a harbour, it may be that, although search has disclosed no proof to bear out the suspicion, grave suspicion still remains. In such case she may be seized and brought into a port for the purpose of being searched there as thoroughly as possible. But the commander of a man-of-war seizing a vessel in such case must bear in mind that full indemnities must be paid to the vessel for loss of time and other losses sustained if finally she is found

[1] See above, vol. I. § 269, and Holland, Prize Law, §§ 217–230.

innocent. Therefore, after a search has brought nothing to light against the vessel, seizure should take place only in case of grave suspicion.

Consequences of Resistance to Visitation.

§ 422. If a neutral merchantman resists visit or search, she is at once captured. No visit and search take place at all after capture, because confiscation is already the penalty for resistance, whether the vessel is or is not liable to be confiscated on other grounds. The question whether the vessel only or also her cargo can be confiscated for resistance is controverted. According to British [1] and American theory and practice, the cargo is likewise confiscated. But Continental [2] writers emphatically argue against this and maintain that the vessel only is liable to confiscation.

What constitutes Resistance.

§ 423. Theory and practice agree that mere flight, mere attempt on the part of a neutral merchantman to escape visitation, does not in itself constitute resistance.[3] But, of course, such vessel may be chased and compelled by force to bring to; some [4] States even order their men-of-war to capture vessels attempting to escape visitation. But it constitutes resistance if a vessel defends herself by force against a man-of-war which endeavours to make her bring to, or if a vessel which has been brought to refuses to admit the visiting officer on board, or refuses to show her papers, or to submit to search. It also constitutes resistance if the master refuses to be present during search, or to open locked parts of the vessel, locked boxes, and the like.

Sailing under Enemy Convoy equivalent to Resistance.

§ 424. Wheaton excepted, all writers would seem to agree that the fact of neutral merchantmen's

[1] The Maria, 1 Rob. 340.
[2] See Gessner, pp. 318-321.
[3] The Maria, 1 Rob. 340.
[4] See U.S. War Code, article 33 (1).

sailing under a convoy of enemy men-of-war is equivalent to resistance on their part, whether they themselves intend to resist by force or not. But the Government of the United States of America in 1810 contested this principle. In that year, during war between Great Britain and Denmark, many American vessels sailing from Russia used to seek protection under the convoy of British men-of-war, whereupon Denmark declared all such American vessels to be good and lawful prizes. Several were captured without making any resistance whatever, and were condemned by Danish Prize Courts. The United States protested, and claimed indemnities from Denmark, and in 1830 a treaty between the parties was signed at Copenhagen,[1] according to which Denmark had to pay 650,000 dollars as indemnity. But in article 5 of this treaty the parties "expressly declare that the present convention is only applicable to the cases therein mentioned, and, having no other object, can never hereafter be invoked by one party or the other as a precedent or a rule for the future."[2]

Resistance by Neutral Convoy.

§ 425. Since Great Britain has never recognised the right of convoy and has always insisted upon the right of visitation to be exercised over neutral merchantmen sailing under the convoy of neutral men-

[1] Martens, N.R., VIII. p. 350.

[2] See Wheaton, §§ 530–537 and Taylor, § 693, p. 790. Wheaton was the negotiator of this treaty on the part of the United States. With the case of neutral merchantmen sailing under enemy convoy, the other case—see above, § 185—is frequently confused, in which neutral goods are placed on board an armed enemy vessel. In the case of the "Fanny" (1 Dodson, 443) Sir William Scott condemned neutral Portuguese property on the ground that placing neutral property on board an armed vessel was equal to resistance against visitation. But the Supreme Court of the United States of America, in the case of the "Nereide" (9 Cranch, 388), held the contrary view. The Court was composed of four judges of whom Story was one, and the latter dissented from the majority and considered the British practice correct. See Phillimore, III. § 341, and Wheaton, § 529.

of-war, the question has arisen whether such merchantmen are considered resisting visitation in case the convoying men-of-war only, and not the convoyed vessels themselves, offer resistance. British practice answers the question in the affirmative. The rule was laid down in 1799[1] and in 1804[2] by Sir William Scott in the cases of Swedish vessels captured while sailing under the convoy of a Swedish man-of-war.

Deficiency of Papers.

§ 426. Since the purpose of visit is to ascertain the nationality of the vessel, the character of her cargo and passengers, and the ports from and to which she is sailing, it is obvious that this purpose cannot be realised in case the visited vessel is deficient in her papers. As stated above in vol. I. § 262, every merchantman ought to carry the following papers: (1) A certificate of registry or a sea-letter (passport); (2) the muster-roll; (3) the log-book; (4) the manifest of cargo; (5) bills of lading, and (6) if chartered, the charter-party. Now, if a vessel is visited and cannot produce one or more of the mentioned papers, she is suspect. Search is, of course, admissible for the purpose of verifying the suspicion, but it may be that, although search has not produced any proof of guilt, the suspicion is not dispelled. In such case she may be seized and brought to a port for thorough examination. But, with the exception of the case that she cannot produce either certificate of registry or a sea-letter (passport), she cannot be confiscated for deficiency in papers only. Yet, if the cargo is also suspect, or if there are other circumstances which increase the suspicion, confiscation is in the discretion of the Prize Court.

§ 427. Mere deficiency of papers does not arouse

[1] The Maria, 1 Rob. 340. [2] The Elsebe, 5 Rob. 173.

the same suspicion which a vessel incurs if she destroys [1] or throws overboard any of her papers, defaces them or conceals them, and in especial in case the spoliation of papers takes place at the time when the visiting vessel comes in sight. Whatever her cargo may be, a vessel may at once be seized without further search as soon as it becomes apparent that spoliation, defacement, or concealment of papers has taken place. The practice of the different States differs with regard to other consequences of spoliation, and the like, of papers, but confiscation is certainly admissible in case other circumstances increase the suspicion.[2]

Spoliation, Defacement, and Concealment of Papers.

§ 428. The highest suspicion is roused through the fact that a visited vessel carries double papers, or false [3] papers, and such vessel may certainly be seized. But the practice of the different States differs with regard to the question whether confiscation is admissible for the mere fact of carrying double or false papers. Whereas the practice of some States, as Russia and Spain, answers the question in the affirmative, British [4] and American [5] practice takes a more lenient view, and condemns such vessels only on a clear inference that the false or double papers were carried for the purpose of deceiving the belligerent by whom the capture was made, but not in other cases.[6]

Double and False Papers.

[1] The Hunter, 1 Dodson, 480.
[2] See the case of The Apollo in Calvo, V. § 2989.
[3] The Sarah, 3 Rob. 330.
[4] The Eliza and Katy, 6 Rob. 192.
[5] The St. Nicholas, 1 Wheaton 417.
[6] See Halleck, II. p. 271; Hall, § 276; Taylor, § 690.

II

Capture

Hall, § 277—Lawrence, § 215—Phillimore, III. §§ 361-364—Twiss, II. §§ 166-184—Halleck, II. pp. 362-391—Taylor, § 691—Bluntschli, § 860—Heffter, §§ 171, 191, 192—Geffcken in Holtzendorff, IV. pp. 777-780—Ullmann, § 168—Rivier, II. pp. 426-428—Calvo, V. §§ 3004-3034—Fiore, III. Nos. 1644-1657—Martens, II. §§ 126-137—Kleen, II. §§ 203-218—Gessner, pp. 333-356—Boeck, Nos. 770-777—Dupuis, Nos. 253-281—Perels, § 55—Testa, pp. 243-244—Hautefeuille, III. pp. 214-299—Holland, Prize Law, §§ 231-314—U.S. Naval War Code, articles 46-50—See also the monographs quoted above at the commencement of § 391, and Bulmerincq's articles on "Le droit des prises maritimes" in R.I., X-XIII. (1878-1881).

Grounds and Mode of Capture.

§ 429. From the statements given above in §§ 368-428 regarding blockade, contraband, analogous of contraband, and visitation, it is obvious that capture takes place either because the vessel or the cargo or both are liable to confiscation, or because grave suspicion demands a further inquiry, which can be carried out in a port only. Both cases are alike as far as all details of capture are concerned, and in the latter case Prize Courts may pronounce capture to be justified, although no ground for confiscation of either vessel or cargo or both has been detected.

The mode of capture is the same as described above in § 184 regarding capture of enemy vessels.[1]

Effect of Capture of Neutral Vessels, and their Conduct to Port.

§ 430. The effect of capture of neutral vessels is in every way different from the effect of capture of enemy vessels,[2] since the purpose of capture differs in these two cases. Capture of enemy vessels

[1] The "Règlement international des prises maritimes," adopted by the Institute of International Law at its meeting at Heidelberg in 1887, regulates capture in §§ 45-62; see Annuaire, IX. (1888), p. 204.

[2] See above, § 185.

is made for the purpose of appropriating them in the exercise of the right of belligerents to appropriate all enemy property found on the Open Sea or in the maritime territorial belt of either belligerent. On the other hand, neutral merchantmen are only captured for the purpose of confiscation of vessel or cargo, or both, as punishment for certain special acts, the punishment to be pronounced by a Prize Court after a thorough investigation into all the circumstances of the special case. Therefore, although the effect of capture of neutral vessels is that the vessels, the individuals, and the goods thereon are placed under the captor's authority, her officers and crew do not become prisoners of war. They are indeed to be detained as witnesses for the trial of the vessel and cargo, but nothing stands in the way of releasing those of them who are not wanted for that purpose. As regards passengers, if any, they have to be released as soon as possible, with the exception of those enemy persons who can be made prisoners of war.

Regarding the conduct of captured neutral vessels to a port of a Prize Court, the same is valid as regards conduct of captured enemy vessels[1] to such port.

Destruction of Neutral Prizes.

§ 431. That as a rule captured neutral vessels may not be sunk, burned, or otherwise destroyed is as universally recognised as that captured enemy merchantmen may not as a rule be destroyed. But whereas, as shown above in § 194, the destruction of captured enemy merchantmen before a verdict is obtained against them is, in exceptional cases, lawful, it is a moot question whether the destruction of captured neutral vessels is likewise exceptionally

[1] See above, § 193.

allowed instead of bringing them before a Prize Court.

British [1] practice does not, as regards the neutral owner of the vessel, hold the captor justified in destroying a vessel, however exceptional the case may be, and however meritorious the destruction of the vessel may be from the point of view of the Government of the captor. For this reason, should a captor, for any motive whatever, have destroyed a neutral prize, full indemnities are to be paid to the owner, although, if brought into a port of a Prize Court, condemnation of vessel and cargo would have been pronounced beyond doubt. The rule is, that a neutral prize must be abandoned in case it cannot, for any reason whatever, be brought to a port of a Prize Court.[2]

But the practice of other States does not recognise this rule. Thus, the United States Naval War Code, article 50, declares: "If there are controlling reasons why vessels that are properly captured may not be sent in for adjudication—such as unseaworthiness, the existence of infectious disease, or the lack of a prize-crew—they may be appraised and sold, and, if this cannot be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there should be no doubt that the vessel was a proper prize. But in all such cases all the papers and other testimony should be sent to the Prize Court, in order that a decree may be duly entered." According to Article 20 of her instructions of 1870,

[1] The Actaeon, 2 Dodson, 48; Felicity, 2 Dodson, 381; Leucade, Spinks, 217. See Holland, Prize Law, § 303.

[2] See Professor Holland's letters published in the "Times" on August 6, 17, 30, 1904, and June 29, 1905. See also Holland, Neutral Duties in a Maritime War, as illustrated by Recent Events (1905, from the Proceedings of the British Academy, vol. II.) pp. 12, 13; Phillimore, III. § 333; Twiss, II. § 166; Hall, § 77; Lawrence, § 215.

France allows her captors to destroy prizes—apparently neutral as well as enemy prizes—when the destruction is necessary for the safety of the captor or for the success of his operations. Russia, already in 1869, by § 108 of her Prize Regulations, allowed the destruction of a neutral as well as an enemy prize on account of its bad condition, risk of recapture, impossibility of sparing a prize crew, and small value of the prize vessel. And according to Article 21 of the Russian Prize Regulations of 1895 and Article 40 of instructions of 1901, the commander of a cruiser is authorised, under his personal responsibility, to burn or sink a neutral or enemy prize if it is impossible to preserve it on account of its bad condition, small value, danger of recapture, distance or blockade of the Russian ports, danger to the captor or the success of his operations. Japan, which according to Article 20 of her Prize Law of 1894 ordered her captors to release neutral prizes after confiscation of their contraband goods, in case the vessels cannot be brought into a port, altered her attitude in 1904, and allowed in certain cases the destruction of neutral prizes.

Continental writers on International Law agree just as little as the States on the question of destruction of neutral prizes. Whereas some emphatically answer it in the negative,[1] others decidedly answer it in the affirmative.[2]

Thus the matter is not at all settled. The question became of great importance in 1904, during the Russo-Japanese War. No case of Japanese captors sinking neutral prizes is reported but Russian

[1] See, for instance, Taylor, § 691, and Kleen, II. pp. 531–534.

[2] See, for instance, Geffcken in Holtzendorff, IV. p. 777; Calvo, V. §§ 3019, 3028–3034; Fiore, III. No. 1655; Martens, II. § 126; Dupuis, Nos. 261–268; Perels, § 55.

cruisers sank the following neutral vessels: the "Knight Commander," "Hipsang," "Ikhona," "St. Kilda" (British),[1] the "Tetardos" and "Thea" (German), the "Princess Marie" (Danish). It is not reported whether Germany and Denmark protested, but Great Britain strongly objected to the Russian practice and claimed damages for the British vessels concerned. There is no doubt that the matter will be a point to be discussed by the imminent second Peace Conference at the Hague. It ought to be settled in conformity with the more lenient British practice, for otherwise the door would be open to abuse.

It ought to be mentioned that the question of destruction of neutral prizes must not be confounded with the destruction of neutral vessels in exercise of the so-called right of angary. This right—see above, § 365—can be exercised against neutral vessels whether they are prizes or not.

Be that as it may, whenever a neutral vessel is for any reason whatever burnt, sunk, or otherwise destroyed, her crew, papers, and, if possible, her cargo, must be removed.

Ransom and Recapture of Neutral Prizes.

§ 432. Regarding ransom of captured neutral vessels, the same is valid as regards ransom of captured enemy vessels.[2]

As regards recapture of neutral prizes,[3] the rule ought to be that *ipso facto* by recapture the vessel becomes free without payment of any salvage. Although captured, she was still the property of her neutral owners, and if condemnation had taken place at all, it would have been a punishment, and the re-

[1] See Lawrence, War, pp. 250–261.

[2] See above, § 195.

[3] See Hautefeuille, III. pp. 366–406; Gessner, pp. 344–356; Kleen, II. § 217; Geffcken in Holtzendorff, IV. pp. 778–780; Calvo, V. §§ 3210–3216.

capturing belligerent has no interest whatever in the punishment of a neutral vessel by the enemy.

But the matter of recapture of neutral prizes is not settled, no rule of International Law and no uniform practice of the different States being formulated regarding it. Very few treaties touch upon it, and the municipal regulations of the different States regarding prizes seldom mention it. According to British practice,[1] the recaptor of a neutral prize is entitled to salvage, in case the recaptured vessel would have been liable to condemnation if brought into an enemy port.

Release after Capture.

§ 433. Besides the case in which captured vessels must be abandoned, because they can for some reason or another not be brought into a port, there are cases in which they are released without a trial. The rule is that a captured neutral vessel is to be tried by a Prize Court in case the captor asserts her to be suspicious or guilty. But it may happen that all suspicion is dispelled even before the trial, and then the vessel is to be released at once. For this reason Article 246 of Holland's Prize Law lays down the rule: "If, after the detention of the vessel, there should come to the knowledge of the commander any further acts tending to show that the vessel has been improperly detained, he should immediately release her. . . ." Even after she has been brought into the port of a Prize Court, release can take place without a trial. Thus the German vessels "Bundesrath" and "Herzog," which were captured in 1900 during the South African War and brought to Durban, were, after search had dispelled all suspicion, released without trial.

[1] The War Onskan, 2 Rob. 299. See Holland, Prize Law, § 270.

III

Trial of Captured Neutral Vessels

Lawrence, §§ 212–214—Maine, p. 96—Manning, pp. 472–483—Phillimore, III. §§ 433–508—Twiss, II. §§ 169–170—Halleck, II. pp. 393–429—Taylor, §§ 563–567—Wharton, III. §§ 328–330—Wheaton, §§ 389–397—Bluntschli, §§ 841–862—Heffter, §§ 172–173—Geffcken in Holtzendorff, IV. pp. 781–788—Ullmann, § 168—Bonfils, Nos. 1676–1691—Despagnet, Nos. 664–670—Rivier, II. pp. 353–356—Calvo, V. §§ 3035–3087—Fiore, III. Nos. 1681–1691—Martens, II. §§ 125–126—Kleen, II. §§ 219–234—Gessner, pp. 357–427—Boeck, Nos. 740–800—Dupuis, Nos. 282–301—Perels, §§ 56–57—Testa, pp. 244–247—Hautefeuille, III. pp. 299–365.—See also the monographs quoted above at the commencement of § 391, and Bulmerincq's articles on "Les droits des prises maritimes" in R.I., X.–XIII. (1878–1881).

Trial of Captured Vessels a Municipal Matter.

§ 434. Although belligerents have, according to International Law, the right to capture neutral vessels under certain circumstances, and although they have the duty to bring these vessels for trial before Prize Courts, such trials are in no way an international matter. Just as Prize Courts are a municipal [1] institution, so trials of captured neutral vessels are a municipal matter. The neutral home States of the vessels are not represented and, directly at least, not concerned in the trial. Nor is, as commonly maintained, the law administered by Prize Courts International Law. These Courts apply the law of their country. The best proof of this is the fact that the practice of the Prize Courts of different countries differs in many points. Thus, for

[1] See above, § 192. The matter is regulated as far as Great Britain is concerned by the Naval Prize Act, 1864 (27 and 28 Vict. ch. 25) and the Prize Courts Act, 1894 (57 and 58 Vict. ch. 39); see Appendices XI. and XII. below, pp. 540 and 555. The "Règlement international des prises maritimes," adopted in 1887 at Heidelberg by the Institute of International Law, provides in §§ 63–118 detailed rules concerning the organisation of Prize Courts and the procedure before them; see Annuaire, IX. (1888), p. 208.

instance, the question what is and what is not contraband, and, further, the question when an attempt to break blockade begins and when it ends, are differently answered by the practice of different States. A State may, of course, order its Prize Courts to apply regarding certain cases and questions the rules of International Law. But thereby the respective State, instead of supplying the Courts with Municipal Law, leaves it to them to build up a practice which is in accordance with International Law. And there ought to be no doubt that a State in fact can at any moment interfere and order its Prize Courts to apply henceforth such and such rules, whether or not the latter are in accordance with International Law.[1] That a State by ordering its Prize Courts to apply rules which are not in accordance with International Law would commit an international delinquency is, of course, obvious.

Result of Trial.

§ 435. The results of the trial of captured neutral ships can be five. Vessel and cargo may be condemned, or the vessel alone, or the cargo alone; and the vessel and cargo may be released either with or without costs and damages. Costs and damages will be allowed when capture was not justified. But

[1] Many writers on International Law maintain that Prize Courts are International Courts, and that the law administered by these courts is International Law. Lord Stowell again and again—the Maria, 1 Rob. 340; Recovery, 6 Rob. 348; Fox and Others, Edwards, 311—emphatically asserted it. And almost all English and American writers—see, however, Holland, Studies, p. 199, who agrees with me—adopt Lord Stowell's standpoint; see Halleck, II. pp. 411-412; Maine, p. 96; Manning, p. 472; Phillimore, III. §§ 433-436; Hall, § 277; Lawrence, § 212. But it is to be expected that the recognition of the differences between Municipal and International Law—see above, vol. I. §§ 20-25—and of the fact that States only, and neither their officials nor their Courts nor their citizens are subjects of International Law—see above, vol. I. § 13—will lead to the general recognition of the fact that the law applied by Prize Courts is not and cannot be International Law.

it must be emphasised that capture may be justified, as, for instance, in the case of spoliation of papers, although the Prize Court does not condemn the vessel, and, further, that costs and damages are never allowed in case a part only of the cargo is condemned, although the vessel herself and the greater part of the cargo are released. That, in case the captor is unable to pay the costs and damages allowed to a released neutral vessel, his Government has to indemnify the vessel, there ought to be no doubt, for a State bears "vicarious" responsibility [1] for internationally injurious acts of his naval forces.

Trial after Conclusion of Peace.

§ 436. It is a moot question whether neutral vessels captured before conclusion of peace can be tried after the conclusion of peace.[2] I think that the answer must be in the affirmative, even if a special clause is contained in the Treaty of Peace, which stipulates that captured but not yet condemned vessels of the belligerents shall be released. A trial of neutral prizes is in any case necessary for the purpose of deciding the fact whether or not capture was justified, and whether, although condemnation would not be justified, the neutral vessels can claim costs and indemnities. Thus, after the conclusion of the Abyssinian War, in December 1896, the Italian Prize Commission, in the case of the "Doelwijk," [3] pronounced its right to try the vessel in spite of the fact

[1] See above, vol. I. § 163.

[2] See Perels, § 57, p. 309, in contradistinction to Bluntschli, § 862. But there is, of course, no doubt that the belligerent concerned can exercise an act of grace and release such prizes. Thus, in November 1905, at the end of the Russo-Japanese War, the Mikado proclaimed the unconditional release of all neutral prizes captured after the signing but before the ratification of the Peace of Portsmouth. Thereby, three German vessels, two English, and one Norwegian escaped confiscation, which in strict law—see above, p. 458, note 4—would have been justified.

[3] See Martens, N.R.G., 2nd ser. XXVIII. pp. 66–90.

that peace had been concluded between the time of capture and trial, declared the capture of the vessel and cargo to have been justified, but pronounced that, peace having been concluded, confiscation of vessel and cargo would no longer be lawful.

Different from the question whether neutral prizes can be tried after the conclusion of peace is the other question whether they can be condemned to be confiscated. In the above-mentioned case of the "Doelwijk" the question was answered in the negative, but I believe it ought to be answered in the affirmative. Confiscation of vessel and cargo having the character of a punishment, it would seem that the punishment may be inflicted after the conclusion of peace provided the criminal act concerned was consummated before peace was concluded. But nothing, of course, stands in the way of the single States taking a more lenient view and ordering their Prize Courts not to pronounce confiscation of neutral vessels after the conclusion of peace.

Protests and Claims of Neutrals after Trial.

§ 437. If a trial leads to condemnation, and if the latter is confirmed by the Court of Appeal, the matter as between the captor and the owner of the captured vessel and cargo is finally settled. But the right of protection,[1] which a State exercises over its subjects and their property abroad, may nevertheless be the cause of diplomatic protests and claims on the part of the neutral home State of a condemned vessel or cargo, in case the verdict of the Prize Courts is considered not in accordance with International Law or formally or materially unjust. It is through such protests and claims that the matter, which was hitherto a mere municipal one, becomes of *international* importance. And history records many

[1] See above, vol. I. § 319.

instances of cases of interposition of neutral States after trials of vessels which had sailed under their flag. Thus, for instance, in the famous case of the Silesian Loan,[1] it was the fact that Frederick II. of Prussia considered the procedure of British Prize Courts regarding a number of Prussian merchantmen captured during war between Great Britain and France in 1747 and 1748 as unjust, which made him in 1752 resort to reprisals and cease the payment of the interest of the Silesian Loan. The matter was settled[2] in 1756, through the payment of 20,000*l.* as indemnity by Great Britain. Thus, further, after the American Civil War, Articles 12–17 of the Treaty of Washington[3] provided the appointment of three Commissioners for the purpose, amongst others, of deciding all claims against verdicts of the American Prize Courts. And when in 1879, during war between Peru and Chile, the German vessel "Luxor" was condemned by the Peruvian Courts, Germany interposed and the vessel was released.[4]

Reform Projects.

§ 438. Numerous inconveniences result from the present condition of International Law, according to which the Courts of the belligerent whose forces have captured neutral vessels exercise jurisdiction without any control on the part of neutrals. Although, as shown above in § 437, neutrals interfere sometimes after the trial and succeed in getting their claims recognised in the face of the verdicts of Prize Courts, the present condition of matters is not satisfactory, and has, therefore, called forth several proposals for so-called mixed Prize Courts.[5] The

[1] See above, § 37.
[2] See Martens, Causes Célèbres, II. p. 167.
[3] See Martens, N.R.G., XX. p. 698.
[4] See above, § 404.
[5] See Boeck, Nos. 748–764; Geffcken in Holtzendorff, IV. p. 787; Dupuis, No. 289; Bulmerincq in R.I., XI. (1879), pp. 173–191.

first proposal of this kind was made in 1759 by Hübner,[1] who suggested a Prize Court composed of judges nominated by the belligerent and of consuls or councillors nominated by the home State of the captured neutral merchantmen. A somewhat similar proposal was made by Tetens[2] in 1805. Other proposals followed until the Institute of International Law took up the matter in 1875, appointing, on the proposal of Professor Westlake, at its meeting at the Hague, a Commission for the purpose of drafting a "Projet d'organisation d'un tribunal international des prises maritimes." In the course of time there were in the main two proposals before the Institute, Westlake's and Bulmerincq's. Westlake proposed[3] a Court of Appeal to be instituted in each case of war, which should consist of three judges—one to be nominated by the belligerent concerned, another by the home State of the neutral prizes concerned, and the third by a neutral Power not interested in the case. According to Westlake's proposal there would therefore have to be instituted in every war as many Courts of Appeal as neutrals are concerned. Bulmerincq proposed[4] two Courts to be instituted in each war for all prize cases—the one to act as Prize Court of the First Instance, the other to act as Prize Court of Appeal, each Court to consist of three judges—one judge to be appointed by either belligerent, the third judge to be appointed in common by all neutral maritime Powers. Finally, the Institute agreed at its meeting at Heidelberg in 1887 upon the following proposal,

[1] De la saisie des bâtiments neutres (1759), vol. II. p. 21.

[2] Considérations sur les droits réciproques des puissances belligerantes et des puissances neutres sur mer, avec les principes du droit de guerre en général (1805), p. 62.

[3] See Annuaire, II. (1878), p. 114.

[4] See R.I., XI. (1879), pp. 191–194.

which is embodied in §§ 100–109 of the "Règlement international des prises maritimes:" [1] At the beginning of a war either belligerent institutes a Court of Appeal consisting of five judges, the president and one of the other judges to be appointed by the belligerent, the three remaining to be nominated by three neutral Powers, this Court to be competent for all prize cases.

Thus the matter stands at present. To carry out the proposal of the Institute, it would first be necessary for the Powers to agree upon a common code of prize law, such as proposed by the "Règlement international des prises maritimes" of the Institute.

[1] Annuaire, IX. (1887), p. 239.

APPENDICES

APPENDIX I

FOREIGN ENLISTMENT ACT, 1870

33 & 34 Vict., Chapter 90

An Act to regulate the conduct of Her Majesty's Subjects during the existence of hostilities between foreign states with which Her Majesty is at peace. [9 August 1870.]

Whereas it is expedient to make provision for the regulation of the conduct of Her Majesty's subjects during the existence of hostilities between foreign states with which Her Majesty is at peace:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary

Short Title of Act.

1. This Act may be cited for all purposes as "The Foreign Enlistment Act, 1870."

Application of Act.

2. This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters.

Commencement of Act.

3. This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act.

Illegal Enlistment

Penalty on Enlistment in Service of Foreign State.

4. If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on leaving Her Majesty's Dominions with intent to serve a Foreign State.

5. If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on embarking Persons under False Representations as to Service.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on taking illegally enlisted Persons on board Ship.

7. If the master or owner of any ship, without the license of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,

(1.) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the license of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state:

(2.) Any person, being a British subject, who, without the license of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state:

(3.) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state:

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,

(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour: and

(2.) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace: and

(3.) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

Illegal Shipbuilding and Illegal Expeditions

Penalty on illegal Shipbuilding and illegal Expeditions.

8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say,—

(1.) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(3.) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or

(4.) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state:

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1.) The offender shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2.) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty:

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; (that is to say,)

(1.) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or

equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State:

(2.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.

Presumption as to Evidence in case of Illegal Ship.

9. Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.

Penalty on aiding the Warlike Equipment of Foreign Ships.

10. If any person within the dominions of Her Majesty, and without the license of Her Majesty,—

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign state at war with any friendly state,—

Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on fitting out Naval or Military Expeditions without License.

11. If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

(1.) Every person engaged in such preparation or fitting out,

or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2.) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

Punishment of Accessories.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

Limitation of Term of Imprisonment.

13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

Illegal Prize

Illegal Prize brought into British Ports restored.

14. If during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandize captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent or for any person authorised in that behalf by the Government of the foreign state to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal as in case of any order made in the exercise of the ordinary jurisdiction of such court; and in the meantime and until a final order has been made on such application the court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandize, and (if the same be of perishable nature, or incurring risk of

deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such court in the exercise of its ordinary jurisdiction.

General Provision

License by Her Majesty how granted.

15. For the purposes of this Act, a license by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.

Legal Procedure

Jurisdiction in respect of Offences by Persons against Act.

16. Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

Venue in respect of Offences by Persons. 24 & 25 Vict. c. 97.

17. Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

Power to remove Offenders for Trial.

18. The following authorities, that is to say, in the United Kingdom any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the court having the highest criminal jurisdiction in that place, may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed

shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

Jurisdiction in respect of Forfeiture of Ships for Offences against Act.

19. All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court; and the Court of Admiralty shall, in addition to any power given to the court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

Regulations as to Proceedings against the Offender and the Ship.

20. Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

Officer authorised to seize offending Ships.

21. The following officers, that is to say,

(1.) Any officer of customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs or any officer of the Board of Trade, subject nevertheless to any special or general instructions from the Board of Trade;

(2.) Any officer of customs or public officer in any British possession, subject nevertheless to any special or general instructions from the governor of such possession;

(3.) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer;

(4.) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer,

may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the "local authority;" but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

Powers of Officers authorised to seize Ships.

22. Any officer authorised to seize or detain any ship in respect of any offence against this Act may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of Her Majesty's army or navy or marines, or any excise officers or officers of customs, or any harbour-master or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same, and to enforce the provisions of this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as well against the Queen's Majesty, Her heirs and successors, as against all persons so killed, maimed, or hurt.

Special Power of Secretary of State or Chief Executive Authority to detain Ship.

23. If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner herein-after mentioned.

The owner of the ship so detained, or his agent, may apply

to the Court of Admiralty for its release, and the court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

If the applicant establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped or intended to be despatched contrary to this Act, the ship shall be released and restored.

If the applicant fail to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

The court may in cases where no proceedings are pending for its condemnation release any ship detained under this section on the owner giving security to the satisfaction of the court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed contrary to this Act, or may release the ship without such security if the Secretary of State or chief executive authority think fit so to release the same.

If the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the court, and any amount so assessed shall be payable by the Commissioners of the Treasury out of any moneys legally applicable for that purpose. The Court of Admiralty shall also have power to make a like order for the indemnity of the owner, on the application of such owner to the court, in a summary way, in cases where the ship is released by the order of the Secretary of State or the chief executive authority, before any application is made by the owner or his agent to the court for such release.

Nothing in this section contained shall affect any proceedings instituted or to be instituted for the condemnation of any ship detained under this section where such ship is liable to for-

feiture, subject to this provision, that if such ship is restored in pursuance of this section all proceedings for such condemnation shall be stayed; and where the court declares that the owner is to be indemnified by the payment of costs and damages for the detainer, all costs, charges, and expenses incurred by such owner in or about any proceedings for the condemnation of such ship shall be added to the costs and damages payable to him in respect of the detention of the ship.

Nothing in this section contained shall apply to any foreign non-commissioned ship despatched from any part of Her Majesty's dominions after having come within them under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character has taken place in this country.

Special Power of Local Authority to detain Ship.

24. Where it is represented to any local authority, as defined by this Act, and such local authority believes the representation, that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority.

Upon the receipt of such communication the Secretary of State or chief executive authority may order the ship to be released if he thinks there is no cause for detaining her, but if satisfied that there is reasonable and probable cause for believing that such ship was built, commissioned, or equipped or intended to be despatched in contravention of this Act, he shall issue his warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner as he is entitled to be indemnified where the Secretary of State having

issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the court for such release.

Power of Secretary of State or Executive Authority to grant Search Warrant.

25. The Secretary of State or the chief executive authority may, by warrant, empower any person to enter any dockyard or other place within Her Majesty's dominions and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign state at war with a friendly state, and to search such ship.

Exercise of Powers of Secretary of State or Chief Executive Authority.

26. Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of Her Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say,

(1.) In Ireland by the Lord Lieutenant or other the chief governor or governors of Ireland for the time being, or the chief secretary to the Lord Lieutenant:

(2.) In Jersey by the Lieutenant Governor:

(3.) In Guernsey, Alderney, and Sark, and the dependent islands by the Lieutenant Governor:

(4.) In the Isle of Man by the Lieutenant Governor:

(5.) In any British possession by the Governor:

A copy of any warrant issued by a Secretary of State or by any officer authorised in pursuance of this Act to issue such warrant in Ireland, the Channel Islands, or the Isle of Man shall be laid before Parliament.

Appeal from Court of Admiralty.

27. An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the court as a Court of Admiralty.

Indemnity to Officers.

28. Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a ship by the Court of Admiralty no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

Indemnity to Secretary of State or Chief Executive Authority.

29. The Secretary of State shall not, nor shall the chief executive authority, be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness,

except at his own request, in any court of justice in respect of the circumstances which led to the issue of the warrant.

Interpretation Clause

30. In this Act, if not inconsistent with the context, the following terms have the meanings herein-after respectively assigned to them ; that is to say, Interpretation of Terms.

"Foreign state" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people: "Foreign State:"

"Military service" shall include military telegraphy and any other employment whatever, in or in connexion with any military operation: "Military Service:"

"Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque ; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque: "Naval Service:"

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands: "United Kingdom:"

"British possession" means any territory, colony, or place being part of Her Majesty's dominions, and not part of the United Kingdom, as defined by this Act: "British Possessions:"

"The Secretary of State" shall mean any one of Her Majesty's Principal Secretaries of State: "The Secretary of State:"

"The Governor" shall as respects India mean the Governor General or the Governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor General of the whole possession or the Governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession ; also any person acting for or in the capacity of a governor shall be included under the term "Governor": "Governor:"

"Court of Admiralty:" "Court of Admiralty" shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within Her Majesty's dominions:

"Ship:" "Ship" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water:

"Building:" "Building" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly:

"Equipping:" "Equipping" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly:

"Ship and Equipment:" "Ship and equipment" shall include a ship and everything in or belonging to a ship:

"Master:" "Master" shall include any person having the charge or command of a ship.

Repeal of Acts, and Saving Clauses

Repeal of Foreign Enlistment Act. 59 G. 3. c. 69.

31. From and after the commencement of this Act, an Act passed in the fifty-ninth year of the reign of His late Majesty King George the Third, chapter sixty-nine, intituled "An Act "to prevent the enlisting or engagement of His Majesty's "subjects to serve in foreign service, and the fitting out or "equipping, in His Majesty's dominions, vessels for warlike "purposes, without His Majesty's license," shall be repealed: Provided that such repeal shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, nor the institution of any investigation or legal proceeding, or any other remedy for enforcing any such penalty, forfeiture, or punishment as aforesaid.

Saving as to Commissioned Foreign Ships.

32. Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state, or give to any British court over or in respect of any ship entitled to

recognition as a commissioned ship of any foreign state any jurisdiction which it would not have had if this Act had not passed.

Penalties not to extend to Persons entering into Military Service in Asia. 59 G. 3, c. 69, s. 12.

33. Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of princes, states, or potentates in Asia.

APPENDIX II

DECLARATION OF PARIS (1856)

Les Plénipotentiaires qui ont signé le Traité de Paris du trente Mars, mil huit cent cinquante-six, réunis en Conférence,—

Considérant :

Que le droit maritime, en temps de guerre, a été pendant longtemps l'objet de contestations regrettables ;

Que l'incertitude du droit et des devoirs en pareille matière, donne lieu, entre les neutres et les belligérants, à des divergences d'opinion qui peuvent faire naître des difficultés sérieuses et même des conflits ;

Qu'il y a avantage, par conséquent, à établir une doctrine uniforme sur un point aussi important ;

Que les Plénipotentiaires assemblés au Congrès de Paris ne sauraient mieux répondre aux intentions, dont leurs Gouvernements sont animés, qu'en cherchant à introduire dans les rapports internationaux des principes fixes à cet égard ;

Dûment autorisés, les susdits Plénipotentiaires sont convenus de se concerter sur les moyens d'atteindre ce but ; et étant tombés d'accord ont arrêté la Déclaration solennelle ci-après :—

1. La course est et demeure abolie ;

2. Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre ;

3. La marchandise neutre, à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi ;

4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi.

Les Gouvernements des Plénipotentiaires soussignés s'engagent à porter cette Déclaration à la connaissance des Etats, qui n'ont pas été appelés à participer au Congrès de Paris, et à les inviter à y accéder.

Convaincus que les maximes qu'ils viennent de proclamer ne sauraient être accueillies qu'avec gratitude par le monde entier, les Plénipotentiaires soussignés ne doutent pas, que les efforts de leurs Gouvernements pour en généraliser l'adoption ne soient couronnés d'un plein succès.

La présente Déclaration n'est et ne sera obligatoire qu'entre les Puissances, qui y ont, ou qui y auront accédé.

Fait à Paris, le seize Avril, mil huit cent cinquante-six.

APPENDIX III

GENEVA CONVENTION (1864)

Article I

Les ambulances et les hôpitaux militaires seront reconnus neutres, et, comme tels, protégés et respectés par les belligérants aussi longtemps, qu'il s'y trouvera des malades ou des blessés.

La neutralité cesserait, si ces ambulances ou ces hôpitaux étaient gardés par une force militaire.

Article II

Le personnel des hôpitaux et des ambulances, comprenant l'intendance, les services de santé, d'administration, de transport des blessés, ainsi que les aumôniers, participera au bénéfice de la neutralité lorsqu'il fonctionnera, et tant qu'il restera des blessés à relever ou à secourir.

Article III

Les personnes désignées dans l'Article précédent pourront, même après l'occupation par l'ennemi, continuer à remplir leurs fonctions dans l'hôpital ou l'ambulance qu'elles desservent, ou se retirer pour rejoindre le corps auquel elles appartiennent.

Dans ces circonstances, lorsque ces personnes cesseront leurs fonctions, elles seront remises aux avant-postes ennemis, par les soins de l'armée occupante.

Article IV

Le matériel des hôpitaux militaires demeurant soumis aux lois de la guerre, les personnes attachées à ces hôpitaux ne pourront, en se retirant, emporter que les objets, qui sont leur propriété particulière.

Dans les mêmes circonstances, au contraire, l'ambulance conservera son matériel.

Article V

Les habitants du pays qui porteront secours aux blessés seront respectés, et demeureront libres. Les Généraux des Puissances belligérantes auront pour mission de prévenir les habitants de l'appel fait à leur humanité, et de la neutralité qui en sera la conséquence.

Tout blessé recueilli et soigné dans une maison y servira de sauvegarde. L'habitant qui aura recueilli chez lui des blessés sera dispensé du logement des troupes, ainsi que d'une partie des contributions de guerre qui seraient imposées.

Article VI

Les militaires blessés ou malades seront recueillis et soignés, à quelque nation qu'ils appartiendront.

Les Commandants en chef auront la faculté de remettre immédiatement aux avantpostes ennemis, les militaires blessés pendant le combat, lorsque les circonstances le permettront, et du consentement des deux partis.

Seront renvoyés dans leurs pays ceux qui, après guérison, seront reconnus incapables de servir.

Les autres pourront être également renvoyés, à la condition de ne pas reprendre les armes pendant la durée de la guerre.

Les évacuations, avec le personnel qui les dirige, seront couvertes par une neutralité absolue.

Article VII

Un drapeau distinctif et uniforme sera adopté pour les hôpitaux, les ambulances, et les évacuations. Il devra être, en toute circonstance, accompagné du drapeau national.

Un brassard sera également admis pour le personnel neutralisé, mais la délivrance en sera laissée à l'autorité militaire.

Le drapeau et le brassard porteront croix rouge sur fond blanc.

Article VIII

Les détails d'exécution de la présente Convention seront réglés par les Commandants en chef des armées belligérantes, d'après les instructions de leurs Gouvernements respectifs, et conformément aux principes généraux énoncés dans cette Convention.

Article IX

Les Hautes Puissances Contractantes sont convenues de communiquer la présente Convention aux Gouvernements, qui n'ont pu envoyer des Plénipotentiaires à la Conférence internationale de Genève, en les invitant à y accéder; le Protocole est à cet effet laissé ouvert.

Article X

La présente Convention sera ratifiée, et les ratifications en seront échangées à Berne, dans l'espace de quatre mois, ou plus tôt si faire se peut.

En foi de quoi les Plénipotentiaires respectifs l'ont signée, et y ont apposé le cachet de leurs armes.

Fait à Genève, le vingt-deuxième jour du mois d'Août, de l'an mil huit cent soixante-quatre.

APPENDIX IV

DECLARATION OF ST. PETERSBURG (1868)

Sur la proposition du Cabinet Impérial de Russie, une Commission Militaire Internationale ayant été réunie à Saint-Pétersbourg, afin d'examiner la convenance d'interdire l'usage de certains projectiles en temps de guerre entre les nations civilisées, et cette Commission ayant fixé d'un commun accord les limites techniques où les nécessités de la guerre doivent s'arrêter devant les exigences de l'humanité, les Soussignés sont autorisés par les ordres de leurs Gouvernements à déclarer ce qui suit :

Considérant que les progrès de la civilisation doivent avoir pour effet d'atténuer autant que possible les calamités de la guerre ;

Que le seul but légitime que les Etats doivent se proposer durant la guerre est l'affaiblissement des forces militaires de l'ennemi ;

Qu'à cet effet, il suffit de mettre hors de combat le plus grand nombre d'hommes possible ;

Que ce but serait dépassé par l'emploi d'armes qui aggraveraient inutilement les souffrances des hommes mis hors de combat, ou rendraient leur mort inévitable ;

Que l'emploi de pareilles armes serait dès lors contraire aux lois de l'humanité ;

Les Parties Contractantes s'engagent à renoncer mutuellement, en cas de guerre entre elles, à l'emploi par leurs troupes de terre ou de mer, de tout projectile d'un poids inférieur à 400 grammes, qui serait ou explosible ou chargé de matières fulminantes ou inflammables.

Elles inviteront tous les Etats, qui n'ont pas participé par l'envoi de Délégués aux délibérations de la Commission Militaire Internationale réunie à Saint-Pétersbourg, à accéder au présent engagement.

Cet engagement n'est obligatoire que pour les Parties Contractantes ou Accédantes en cas de guerre entre deux ou plusieurs d'entre elles : il n'est pas applicable vis-à-vis de Parties non-Contractantes ou qui n'auraient pas accédé.

Il cesserait également d'être obligatoire du moment où, dans une guerre entre Parties Contractantes ou Accédantes, une partie non-Contractante, ou qui n'aurait pas accédé, se joindrait à l'un des belligérants.

Les Parties Contractantes ou Accédantes se réservent de s'entendre ultérieurement toutes les fois qu'une proposition précise serait formulée en vue des perfectionnements à venir que la science pourrait apporter dans l'armement des troupes, afin de maintenir les principes, qu'elles ont posés et de concilier les nécessités de la guerre avec les lois de l'humanité.

Fait à Saint-Pétersbourg, le $\frac{\text{vingt-neuf Novembre}}{\text{onze Décembre}}$, mil huit cent soixante-huit.

APPENDIX V

INTERNATIONAL CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

Signed at the Hague, July 29, 1899

Titre I.—*Du Maintien de la Paix générale*

Article I

En vue de prévenir autant que possible le recours à la force dans les rapports entre les États, les Puissances Signataires conviennent d'employer tous leurs efforts pour assurer le règlement pacifique des différends internationaux.

Titre II.—*Des Bons Offices et de la Médiation*

Article II

En cas de dissentiment grave ou de conflit, avant d'en appeler aux armes, les Puissances Signataires conviennent d'avoir recours, en tant que les circonstances le permettront, aux bons offices ou à la médiation d'une ou de plusieurs Puissances amies.

Article III

Indépendamment de ce recours, les Puissances Signataires jugent utile qu'une ou plusieurs Puissances étrangères au conflit offrent de leur propre initiative, en tant que les circonstances s'y prêtent, leurs bons offices ou leur médiation aux États en conflit.

Le droit d'offrir les bons offices ou la médiation appartient aux Puissances étrangères au conflit, même pendant le cours des hostilités.

L'exercice de ce droit ne peut jamais être considéré par l'une ou l'autre des Parties en litige comme un acte peu amical.



Article IV

Le rôle du médiateur consiste à concilier les prétensions opposées et à apaiser les ressentiments qui peuvent s'être produits entre les Etats en conflit.

Article V

Les fonctions du médiateur cessent du moment où il est constaté, soit par l'une des Parties en litige, soit par le médiateur lui-même, que les moyens de conciliation proposés par lui ne sont pas acceptés.

Article VI

Les bons offices et la médiation, soit sur le recours des Parties en conflit, soit sur l'initiative des Puissances étrangères au conflit, ont exclusivement le caractère de Conseil et n'ont jamais force obligatoire.

Article VII

L'acceptation de la médiation ne peut avoir pour effet, sauf Convention contraire, d'interrompre, de retarder, ou d'entraver la mobilisation et autres mesures préparatoires à la guerre.

Si elle intervient après l'ouverture des hostilités, elle n'interrompt pas, sauf Convention contraire, les opérations militaires en cours.

Article VIII

Les Puissances Signataires sont d'accord pour recommander l'application, dans les circonstances qui le permettent, d'une médiation spéciale sous la forme suivante :—

En cas de différend grave compromettant la paix, les Etats en conflit choisissent respectivement une Puissance à laquelle ils confient la mission d'entrer en rapport direct avec la Puissance choisie d'autre part, à l'effet de prévenir la rupture des relations pacifiques.

Pendant la durée de ce mandat dont le terme, sauf stipulation contraire, ne peut excéder trente jours, les Etats en litige cessent tout rapport direct au sujet du conflit, lequel est considéré comme déféré exclusivement aux Puissances Médiatrices. Celles-ci doivent appliquer tous leurs efforts à régler le différend.

En cas de rupture effective des relations pacifiques, ces Puissances demeurent chargées de la mission commune de profiter de toute occasion pour rétablir la paix.

Titre III.—*Des Commissions Internationales d'Enquête*

Article IX

Dans les litiges d'ordre international n'engageant ni l'honneur ni des intérêts essentiels et provenant d'une divergence d'appréciation sur des points de fait, les Puissances Signataires jugent utile que les Parties qui n'auraient pu se mettre d'accord par les voies diplomatiques instituent, en tant que les circonstances le permettront, une Commission Internationale d'Enquête chargée de faciliter la solution de ces litiges en éclaircissant, par un examen impartial et consciencieux, les questions de fait.

Article X

Les Commissions Internationales d'Enquête sont constituées par Convention spéciale entre les Parties en litige.

La Convention d'Enquête précise les faits à examiner et l'étendue des pouvoirs des Commissaires.

Elle règle la procédure.

L'enquête a lieu contradictoirement.

La forme et les délais à observer, en tant qu'ils ne sont pas fixés par la Convention d'Enquête, sont déterminés par la Commission elle-même.

Article XI

Les Commissions Internationales d'Enquête sont formées, sauf stipulation contraire, de la manière déterminée par l'Article XXXII de la présente Convention.

Article XII

Les Puissances en litige s'engagent à fournir à la Commission Internationale d'Enquête, dans la plus large mesure qu'Elles jugeront possible, tous les moyens et toutes les facilités nécessaires pour la connaissance complète et l'appréciation exacte des faits en question.

Article XIII

La Commission Internationale d'Enquête présente aux Puissances en litige son Rapport signé par tous les membres de la Commission.

Article XIV

Le Rapport de la Commission Internationale d'Enquête, limité à la constatation des faits, n'a nullement le caractère d'une sentence arbitrale. Il laisse aux Puissances en litige une entière liberté pour la suite à donner à cette constatation.

Titre IV.—*De l'Arbitrage International*

Chapitre I.—*De la Justice Arbitrale*

Article XV

L'arbitrage international a pour objet le règlement de litiges entre les États par des Juges de leur choix et sur la base du respect du droit.

Article XVI

Dans les questions d'ordre juridique, et en premier lieu dans les questions d'interprétation ou d'application des Conventions Internationales, l'arbitrage est reconnu par les Puissances Signataires comme le moyen le plus efficace et en même temps le plus équitable de régler les litiges qui n'ont pas été résolus par les voies diplomatiques.

Article XVII

La Convention d'Arbitrage est conclue pour des contestations déjà nées ou pour des contestations éventuelles.

Elle peut concerner tout litige ou seulement les litiges d'une catégorie déterminée.

Article XVIII

La Convention d'Arbitrage implique l'engagement de se soumettre de bonne foi à la sentence arbitrale.

Article XIX

Indépendamment des Traités généraux ou particuliers qui stipulent actuellement l'obligation du recours à l'arbitrage pour

les Puissances Signataires, ces Puissances se réservent de conclure, soit avant la ratification du présent Acte, soit postérieurement, des accords nouveaux, généraux, ou particuliers, en vue d'étendre l'arbitrage obligatoire à tous les cas qu'elles jugeront possible de lui soumettre.

Chapitre II.—*De la Cour Permanente d'Arbitrage*

Article XX

Dans le but de faciliter le recours immédiat à l'arbitrage pour les différends internationaux qui n'ont pu être réglés par la voie diplomatique, les Puissances Signataires s'engagent à organiser une Cour Permanente d'Arbitrage, accessible en tout temps et fonctionnant, sauf stipulation contraire des Parties, conformément aux règles de procédure insérées dans la présente Convention.

Article XXI

La Cour Permanente sera compétente pour tous les cas d'arbitrage, à moins qu'il n'y ait entente entre les Parties pour l'établissement d'une juridiction spéciale.

Article XXII

Un Bureau International établi à La Haye sert de greffe à la Cour.

Ce Bureau est l'intermédiaire des communications relatives aux réunions de celle-ci.

Il a la garde des archives et la gestion de toutes les affaires administratives.

Les Puissances Signataires s'engagent à communiquer au Bureau International de La Haye une copie certifiée conforme de toute stipulation d'arbitrage intervenue entre elles et de toute sentence arbitrale les concernant et rendue par des juridictions spéciales.

Elles s'engagent à communiquer de même au Bureau, les lois, règlements, et documents constatant éventuellement l'exécution des sentences rendues par la Cour.

Article XXIII

Chaque Puissance Signataire désignera, dans les trois mois qui suivront la ratification par elle du présent Acte, quatre

personnes au plus, d'une compétence reconnue dans les questions de droit international, jouissant de la plus haute considération morale et disposées à accepter les fonctions d'arbitres.

Les personnes ainsi désignées seront inscrites, au titre de membres de la Cour, sur une liste qui sera notifiée à toutes les Puissances Signataires par les soins du Bureau.

Toute modification à la liste des arbitres est portée, par les soins du Bureau, à la connaissance des Puissances Signataires.

Deux ou plusieurs Puissances peuvent s'entendre pour la désignation en commun d'un ou de plusieurs membres.

La même personne peut être désignée par des Puissances différentes.

Les membres de la Cour sont nommés pour un terme de six ans. Leur mandat peut être renouvelé.

En cas de décès ou de retraite d'un membre de la Cour, il est pourvu à son remplacement selon le mode fixé pour sa nomination.

Article XXIV

Lorsque les Puissances Signataires veulent s'adresser à la Cour Permanente pour le règlement d'un différend survenu entre elles, le choix des arbitres appelés à former le Tribunal compétent pour statuer sur ce différend, doit être fait dans la liste générale des membres de la Cour.

A défaut de constitution du Tribunal Arbitral par l'accord immédiat des Parties, il est procédé de la manière suivante :

Chaque Partie nomme deux arbitres et ceux-ci choisissent ensemble un surarbitre.

En cas de partage de voix, le choix du surarbitre est confié à une Puissance tierce, désignée de commun accord par les Parties.

Si l'accord ne s'établit pas à ce sujet, chaque Partie désigne une Puissance différente, et le choix du surarbitre est fait de concert par les Puissances ainsi désignées.

Le Tribunal étant ainsi composé, les Parties notifient au Bureau leur décision de s'adresser à la Cour et les noms des arbitres.

Le Tribunal Arbitral se réunit à la date fixée par les Parties.

Les membres de la Cour, dans l'exercice de leurs fonctions et en dehors de leur pays, jouissent des privilèges et immunités diplomatiques.

Article XXV

Le Tribunal Arbitral siège d'ordinaire à La Haye.

Le siège ne peut, sauf le cas de force majeure, être changé par le Tribunal que de l'assentiment des Parties.

Article XXVI

Le Bureau International de La Haye est autorisé à mettre ses locaux et son organisation à la disposition des Puissances Signataires pour le fonctionnement de toute juridiction spéciale d'arbitrage.

La juridiction de la Cour Permanente peut être étendue, dans les conditions prescrites par les règlements, aux litiges existant entre des Puissances non-Signataires ou entre des Puissances Signataires et des Puissances non-Signataires, si les Parties sont convenues de recourir à cette juridiction.

Article XXVII

Les Puissances Signataires considèrent comme un devoir, dans le cas où un conflit aigu menacerait d'éclater entre deux ou plusieurs d'entre elles, de rappeler à celles-ci que la Cour Permanente leur est ouverte.

En conséquence, elles déclarent que le fait de rappeler aux Parties en conflit les dispositions de la présente Convention, et le conseil donné, dans l'intérêt supérieur de la paix, de s'adresser à la Cour Permanente ne peuvent être considérés que comme actes de bons offices.

Article XXVIII

Un Conseil Administratif Permanent composé des Représentants Diplomatiques des Puissances Signataires accrédités à La Haye et du Ministre des Affaires Étrangères des Pays-Bas qui remplira les fonctions de Président, sera constitué dans cette ville le plus tôt possible après la ratification du présent Acte par neuf Puissances au moins.

Ce Conseil sera chargé d'établir et d'organiser le Bureau International, lequel demeurera sous sa direction et sous son contrôle.

Il notifiera aux Puissances la constitution de la Cour et pourvoira à l'installation de celle-ci.

Il arrêtera son règlement d'ordre ainsi que tous autres règlements nécessaires.

Il décidera toutes les questions administratives qui pourraient surgir touchant le fonctionnement de la Cour.

Il aura tout pouvoir quant à la nomination, la suspension, ou la révocation des fonctionnaires et employés du Bureau.

Il fixera les traitements et salaires et contrôlera la dépense générale.

La présence de cinq membres dans les réunions dûment convoquées suffit pour permettre au Conseil de délibérer valablement. Les décisions sont prises à la majorité des voix.

Le Conseil communique sans délai aux Puissances Signataires les règlements adoptés par lui. Il leur adresse chaque année un Rapport sur les travaux de la Cour, sur le fonctionnement des services administratifs, et sur les dépenses.

Article XXIX

Les frais du Bureau seront supportés par les Puissances Signataires dans la proportion établie pour le Bureau International de l'Union Postale Universelle.

Chapitre III.—*De la Procédure Arbitrale*

Article XXX

En vue de favoriser le développement de l'arbitrage, les Puissances Signataires ont arrêté les règles suivantes, qui seront applicables à la procédure arbitrale, en tant que les Parties ne sont pas convenues d'autres règles.

Article XXXI

Les Puissances qui recourent à l'arbitrage signent un Acte spécial (Compromis) dans lequel sont nettement déterminés l'objet du litige ainsi que l'étendue des pouvoirs des arbitres. Cet Acte implique l'engagement des Parties de se soumettre de bonne foi à la sentence arbitrale.

Article XXXII

Les fonctions arbitrales peuvent être conférées à un arbitre unique ou à plusieurs arbitres désignés par les Parties à leur gré, ou choisis par elles parmi les membres de la Cour Permanente d'Arbitrage établie par le présent Acte.

A défaut de constitution du Tribunal par l'accord immédiat des Parties, il est procédé de la manière suivante :

Chaque Partie nomme deux arbitres et ceux-ci choisissent ensemble un surarbitre.

En cas de partage des voix, le choix du surarbitre est confié à une Puissance tierce, désignée de commun accord par les Parties.

Si l'accord ne s'établit pas à ce sujet, chaque Partie désigne une Puissance différente, et le choix du surarbitre est fait de concert par les Puissances ainsi désignées.

Article XXXIII

Lorsqu'un Souverain ou un Chef d'État est choisi pour arbitre, la procédure arbitrale est réglée par lui.

Article XXXIV

Le surarbitre est de droit Président du Tribunal.

Lorsque le Tribunal ne comprend pas de surarbitre, il nomme lui-même son Président.

Article XXXV

En cas de décès, de démission, ou d'empêchement, pour quelque cause que ce soit, de l'un des arbitres, il est pourvu à son remplacement selon le mode fixé pour sa nomination.

Article XXXVI

Le siège du Tribunal est désigné par les Parties. A défaut de cette désignation le Tribunal siège à La Haye.

Le siège ainsi fixé ne peut, sauf le cas de force majeure, être changé par le Tribunal que de l'assentiment des Parties.

Article XXXVII

Les Parties ont le droit de nommer auprès du Tribunal des délégués ou agents spéciaux, avec la mission de servir d'intermédiaires entre elles et le Tribunal.

Elles sont en outre autorisées à charger de la défense de leurs droits et intérêts devant le Tribunal, des Conseils ou avocats nommés par elles à cet effet.

Article XXXVIII

Le Tribunal décide du choix des langues dont il fera usage et dont l'emploi sera autorisé devant lui.

Article XXXIX

La procédure arbitrale comprend en règle générale deux phases distinctes : l'instruction et les débats.

L'instruction consiste dans la communication faite par les agents respectifs, aux membres du Tribunal et à la Partie adverse, de tous actes imprimés ou écrits et de tous documents contenant les moyens invoqués dans la cause. Cette communication aura lieu dans la forme et dans les délais déterminés par le Tribunal en vertu de l'Article XLIX.

Les débats consistent dans le développement oral des moyens des Parties devant le Tribunal.

Article XL

Toute pièce produite par l'une des Parties doit être communiquée à l'autre Partie.

Article XLI

Les débats sont dirigés par le Président.

Ils ne sont publics qu'en vertu d'une décision du Tribunal, prise avec l'assentiment des Parties.

Ils sont consignés dans des procès-verbaux rédigés par des secrétaires que nomme le Président. Ces procès-verbaux ont seuls caractère authentique.

Article XLII

L'instruction étant close, le Tribunal a le droit d'écarter du débat tous Actes ou documents nouveaux qu'une des Parties voudrait lui soumettre sans le consentement de l'autre.

Article XLIII

Le Tribunal demeure libre de prendre en considération les Actes ou documents nouveaux sur lesquels les agents ou Conseils des Parties appelleraient son attention.

En ce cas, le Tribunal a le droit de requérir la production de ces Actes ou documents, sauf l'obligation d'en donner connaissance à la Partie adverse.

ARTICLE XLIV

Le Tribunal peut, en outre, requérir des agents des Parties la production de tous Actes et demander toutes explications nécessaires. En cas de refus le Tribunal en prend acte.

ARTICLE XLV

Les agents et les Conseils des Parties sont autorisés à présenter oralement au Tribunal tous les moyens qu'ils jugent utiles à la défense de leur cause.

ARTICLE XLVI

Ils ont le droit de soulever des exceptions et incidents. Les décisions du Tribunal sur ces points sont définitives et ne peuvent donner lieu à aucune discussion ultérieure.

ARTICLE XLVII

Les membres du Tribunal ont le droit de poser des questions aux agents et aux Conseils des Parties et de leur demander des éclaircissements sur les points douteux.

Ni les questions posées, ni les observations faites par les membres du Tribunal pendant le cours des débats ne peuvent être regardées comme l'expression des opinions du Tribunal en général ou de ses membres en particulier.

ARTICLE XLVIII

Le Tribunal est autorisé à déterminer sa compétence en interprétant le Compromis ainsi que les autres Traités qui peuvent être invoqués dans la matière, et en appliquant les principes du droit international.

ARTICLE XLIX

Le Tribunal a le droit de rendre des ordonnances de procédure pour la direction du procès, de déterminer les formes et délais dans lesquels chaque Partie devra prendre ses conclusions et de procéder à toutes les formalités que comporte l'administration des preuves.

ARTICLE L

Les agents et les Conseils des Parties ayant présenté tous les éclaircissements et preuves à l'appui de leur cause, le Président prononce la clôture des débats.

Article LI

Les délibérations du Tribunal ont lieu à huis-clos.

Toute décision est prise à la majorité des membres du Tribunal.

Le refus d'un membre de prendre part au vote doit être constaté dans le procès-verbal.

Article LII

La sentence arbitrale, votée à la majorité des voix, est motivée. Elle est rédigée par écrit et signée par chacun des membres du Tribunal.

Ceux des membres qui sont restés en minorité peuvent constater, en signant, leur dissentiment.

Article LIII

La sentence arbitrale est lue en séance publique du Tribunal, les agents et les Conseils des Parties présents ou dûment appelés.

Article LIV

La sentence arbitrale, dûment prononcée et notifiée aux agents des Parties en litige, décide définitivement et sans appel la contestation.

Article LV

Les Parties peuvent se réserver dans le Compromis de demander la revision de la sentence arbitrale.

Dans ce cas et sauf convention contraire, la demande doit être adressée au Tribunal qui a rendu la sentence. Elle ne peut être motivée que par la découverte d'un fait nouveau qui eût été de nature à exercer une influence décisive sur la sentence et qui, lors de la clôture des débats, était inconnu du Tribunal lui-même et de la Partie qui a demandé la revision.

La procédure de revision ne peut être ouverte que par une décision du Tribunal constatant expressément l'existence du fait nouveau, lui reconnaissant les caractères prévus par le paragraphe précédent et déclarant à ce titre la demande recevable.

Le Compromis détermine le délai dans lequel la demande de revision doit être formée.

Article LVI

La sentence arbitrale n'est obligatoire que pour les Parties qui ont conclu le Compromis.

Lorsqu'il s'agit de l'interprétation d'une Convention à laquelle ont participé d'autres Puissances que les Parties en litige, celles-ci notifient aux premières les Compromis qu'elles ont conclu. Chacune de ces Puissances a le droit d'intervenir au procès. Si une ou plusieurs d'entre elles ont profité de cette faculté, l'interprétation contenue dans la sentence est également obligatoire à leur égard.

Article LVII

Chaque Partie supporte ses propres frais et une part égale des frais du Tribunal.

Dispositions Générales

Article LVIII

La présente Convention sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances qui ont été représentées à la Conférence Internationale de la Paix de La Haye.

Article LIX

Les Puissances non-Signataires qui ont été représentées à la Conférence Internationale de la Paix pourront adhérer à la présente Convention. Elles auront à cet effet à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

Article LX

Les conditions auxquelles les Puissances qui n'ont pas été représentées à la Conférence Internationale de la Paix pourront adhérer à la présente Convention formeront l'objet d'une entente ultérieure entre les Puissances Contractantes.

Article LXI

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Convention, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

APPENDIX VI

INTERNATIONAL CONVENTION WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND

Signed at the Hague, July 29, 1899

Article I

Les Hautes Parties Contractantes donneront à leurs forces armées de terre des instructions qui seront conformes au "Règlement concernant les Lois et Coutumes de la Guerre sur Terre," annexé à la présente Convention.

Article II

Les dispositions contenues dans le Règlement visé à l'Article I. ne sont obligatoires que pour les Puissances Contractantes en cas de guerre entre deux ou plusieurs d'entre elles.

Ces dispositions cesseront d'être obligatoires du moment où, dans une guerre entre des Puissances Contractantes, une Puissance non contractante se joindrait à 'un des belligérants.

Article III

La présente Convention sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Article IV

Les Puissances non-Signataires sont admises à adhérer à la présente Convention.

Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas, et communiquée par celui-ci à toutes les autres Puissances Contractantes.

Article V

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Convention, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas, et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi les Plénipotentiaires ont signé la présente Convention et l'ont revêtue de leurs cachets.

Fait à La Haye, le vingt-neuf Juillet, mil huit cent quatre-vingt-dix-neuf, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas, et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

Annexe.

Règlement concernant les Lois et Coutumes de la Guerre sur Terre.

Section I.—*Des Belligérants*

Chapitre I.—*De la Qualité de Belligérant*

Article 1. Les lois, les droits, et les devoirs de la guerre ne s'appliquent pas seulement à l'armée, mais encore aux milices et aux corps de volontaires réunissant les conditions suivantes :—

1. D'avoir à leur tête une personne responsable pour ses subordonnés ;

2. D'avoir un signe distinctif, fixe, et reconnaissable à distance ;

3. De porter les armes ouvertement ; et

4. De se conformer dans leurs opérations aux lois et coutumes de la guerre.

Dans les pays où les milices ou des corps de volontaires constituent l'armée ou en font partie, ils sont compris sous la dénomination "d'armée."

Art. 2. La population d'un territoire non occupé qui, à l'approche de l'ennemi, prend spontanément les armes pour combattre les troupes d'invasion sans avoir eu le temps de s'organiser conformément à l'Article 1, sera considérée comme belligérante si elle respecte les lois et coutumes de la guerre.

Art. 3. Les forces armées des parties belligérantes peuvent se composer de combattants et de non-combattants. En cas de capture par l'ennemi, les uns et les autres ont droit au traitement des prisonniers de guerre.

Chapitre II.—*Des Prisonniers de Guerre*

Art. 4. Les prisonniers de guerre sont au pouvoir du Gouvernement ennemi, mais non des individus ou des corps qui les ont capturés.

Ils doivent être traités avec humanité.

Tout ce qui leur appartient personnellement, excepté les armes, les chevaux, et les papiers militaires, reste leur propriété.

Art. 5. Les prisonniers de guerre peuvent être assujettis à l'internement dans une ville, forteresse, camp, ou localité quelconque, avec obligation de ne pas s'en éloigner au delà de certaines limites déterminées; mais ils ne peuvent être enfermés que par mesure de sûreté indispensable.

Art. 6. L'État peut employer, comme travailleurs, les prisonniers de guerre, selon leur grade et leurs aptitudes. Ces travaux ne seront pas excessifs, et n'auront aucun rapport avec les opérations de la guerre.

Les prisonniers peuvent être autorisés à travailler pour le compte d'Administrations publiques ou de particuliers, ou pour leur propre compte.

Les travaux faits pour l'État sont payés d'après les tarifs en vigueur pour les militaires de l'armée nationale exécutant les mêmes travaux.

Lorsque les travaux ont lieu pour le compte d'autres Administrations publiques, ou pour des particuliers, les conditions en sont réglées d'accord avec l'autorité militaire.

Le salaire des prisonniers contribuera à adoucir leur position, et le surplus leur sera compté au moment de leur libération, sauf défalcation des frais d'entretien.

Art. 7. Le Gouvernement au pouvoir duquel se trouvent les prisonniers de guerre est chargé de leur entretien.

A défaut d'une entente spéciale entre les belligérants, les prisonniers de guerre seront traités, pour la nourriture, le couchage, et l'habillement, sur le même pied que les troupes du Gouvernement qui les aura capturés.

Art. 8. Les prisonniers de guerre seront soumis aux lois, règlements, et ordres en vigueur dans l'armée de l'État au pouvoir duquel ils se trouvent. Tout acte d'insubordination autorise, à leur égard, les mesures de rigueur nécessaires.

Les prisonniers évadés, qui seraient repris avant d'avoir pu rejoindre leur armée, ou avant de quitter le territoire occupé par l'armée qui les aura capturés, sont passibles de peines disciplinaires.

Les prisonniers qui, après avoir réussi à s'évader, sont de nouveau faits prisonniers, ne sont passibles d'aucune peine pour la fuite antérieure.

Art. 9. Chaque prisonnier de guerre est tenu de déclarer, s'il est interrogé à ce sujet, ses véritables noms et grade, et, dans le cas où il enfreindrait cette règle, il s'exposerait à une restriction des avantages accordés aux prisonniers de guerre de sa catégorie.

Art. 10. Les prisonniers de guerre peuvent être mis en liberté sur parole, si les lois de leur pays les y autorisent, et, en pareil cas, ils sont obligés, sous la garantie de leur honneur personnel, de remplir scrupuleusement, tant vis-à-vis de leur propre Gouvernement que vis-à-vis de celui qui les a faits prisonniers, les engagements qu'ils auraient contractés.

Dans le même cas, leur propre Gouvernement est tenu de n'exiger ni accepter d'eux aucun service contraire à la parole donnée.

Art. 11. Un prisonnier de guerre ne peut être contraint d'accepter sa liberté sur parole ; de même le Gouvernement ennemi n'est pas obligé d'accéder à la demande du prisonnier réclamant sa mise en liberté sur parole.

Art. 12. Tout prisonnier de guerre, libéré sur parole, et repris portant les armes contre le Gouvernement envers lequel il s'était engagé d'honneur, ou contre les alliés de celui-ci, perd le droit au traitement des prisonniers de guerre, et peut être traduit devant les Tribunaux.

Art. 13. Les individus qui suivent une armée sans en faire directement partie, tels que les correspondants et les reporters de journaux, les vivandiers, les fournisseurs, qui tombent au pouvoir de l'ennemi, et que celui-ci juge utile de détenir, ont droit au traitement des prisonniers de guerre, à condition qu'ils

soient munis d'une légitimation de l'autorité militaire de l'armée qu'ils accompagnaient.

Art. 14. Il est constitué, dès le début des hostilités, dans chacun des États belligérants, et le cas échéant, dans les pays neutres qui auront recueilli des belligérants sur leur territoire, un bureau de renseignements sur les prisonniers de guerre. Ce bureau, chargé de répondre à toutes les demandes qui les concernent, reçoit des divers services compétents toutes les indications nécessaires pour lui permettre d'établir une fiche individuelle pour chaque prisonnier de guerre. Il est tenu au courant des internements et des mutations, ainsi que des entrées dans les hôpitaux et des décès.

Le bureau de renseignements est également chargé de recueillir et de centraliser tous les objets d'un usage personnel, valeurs, lettres, &c., qui seront trouvés sur les champs de bataille ou délaissés par des prisonniers décédés dans les hôpitaux et ambulances, et de les transmettre aux intéressés.

Art. 15. Les Sociétés de Secours pour les prisonniers de guerre, régulièrement constituées selon la loi de leur pays, et ayant pour objet d'être les intermédiaires de l'action charitable, recevront, de la part des belligérants, pour elles et pour leurs agents dûment accrédités, toute facilité, dans les limites tracées par les nécessités militaires et les règles administratives, pour accomplir efficacement leur tâche d'humanité. Les délégués de ces Sociétés pourront être admis à distribuer des secours dans les dépôts d'internement, ainsi qu'aux lieux d'étape des prisonniers rapatriés, moyennant une permission personnelle délivrée par l'autorité militaire, et en prenant l'engagement par écrit de se soumettre à toutes les mesures d'ordre et de police que celle-ci prescrirait.

Art. 16. Les bureaux de renseignements jouissent de la franchise de port. Les lettres, mandats, et articles d'argent, ainsi que les colis postaux destinés aux prisonniers de guerre ou expédiés par eux, seront affranchis de toutes taxes postales, aussi bien dans les pays d'origine et de destination que dans les pays intermédiaires.

Les dons et secours en nature destinés aux prisonniers de guerre seront admis en franchise de tous droits d'entrée et autres, ainsi que des taxes de transport sur les chemins de fer exploités par l'État.

Art. 17. Les officiers prisonniers pourront recevoir le complément, s'il y a lieu, de la solde qui leur est attribuée dans cette

situation par les règlements de leur pays, à charge de remboursement par leur Gouvernement.

Art. 18. Toute latitude est laissée aux prisonniers de guerre pour l'exercice de leur religion, y compris l'assistance aux offices de leur culte, à la seule condition de se conformer aux mesures d'ordre et de police prescrites par l'autorité militaire.

Art. 19. Les testaments de prisonniers de guerre sont reçus ou dressés dans les mêmes conditions que pour les militaires de l'armée nationale.

On suivra également les mêmes règles en ce qui concerne les pièces relatives à la constatation des décès, ainsi que pour l'inhumation des prisonniers de guerre, en tenant compte de leur grade et de leur rang.

Art. 20. Après la conclusion de la paix, le rapatriement des prisonniers de guerre s'effectuera dans le plus bref délai possible.

Chapitre III.—*Des Malades et des Blessés*

Art. 21. Les obligations des belligérants concernant le service des malades et des blessés sont régies par la Convention de Genève du 22 Août, 1864, sauf les modifications dont celle-ci pourra être l'objet.

Section II.—*Des Hostilités*

Chapitre I.—*Des Moyens de Nuire à l'Ennemi, des Sièges, et des Bombardements*

Art. 22. Les belligérants n'ont pas un droit illimité quant au choix des moyens de nuire à l'ennemi.

Art. 23. Outre les prohibitions établies par des Conventions spéciales, il est notamment interdit—

(*a.*) D'employer du poison ou des armes empoisonnées ;

(*b.*) De tuer ou de blesser par trahison des individus appartenant à la nation ou à l'armée ennemie ;

(*c.*) De tuer ou de blesser un ennemi qui, ayant mis bas les armes, ou n'ayant plus les moyens de se défendre, s'est rendu à discrétion ;

(*d.*) De déclarer qu'il ne sera pas fait de quartier ;

(*e.*) D'employer des armes, des projectiles, ou des matières propres à causer des maux superflus ;

(*f.*) D'user indûment du pavillon parlementaire, du pavillon national, ou des insignes militaires et de l'uniforme de l'ennemi, ainsi que des signes distinctifs de la Convention de Genève;

(*g.*) De détruire ou de saisir des propriétés ennemis, sauf les cas où ces destructions ou ces saisies seraient impérieusement commandées par les nécessités de la guerre.

Art. 24. Les ruses de guerre et l'emploi de moyens nécessaires pour se procurer des renseignements sur l'ennemi et sur le terrain sont considérés comme *licites*.

Art. 25. Il est interdit d'attaquer ou de bombarder des villes, villages, habitations, ou bâtiments qui ne sont pas défendus.

Art. 26. Le Commandant des troupes assaillantes, avant d'entreprendre le bombardement, et sauf le cas d'attaque de vive force, devra faire tout ce qui dépend de lui pour en avertir les autorités.

Art. 27. Dans les sièges et bombardements, toutes les mesures nécessaires doivent être prises pour épargner, autant que possible, les édifices consacrés aux cultes, aux arts, aux sciences, et à la bienfaisance, les hôpitaux, et les lieux de rassemblement de malades et de blessés, à condition qu'ils ne soient pas employés en même temps à un but militaire.

Le devoir des assiégés est de désigner ces édifices au lieu de rassemblement par des signes visibles spéciaux qui seront notifiés d'avance à l'assiégeant.

Art. 28. Il est interdit de livrer au pillage même une ville ou localité prise d'assaut.

Chapitre II.—*Des Espions*

Art. 29. Ne peut être considéré comme espion que l'individu qui, agissant clandestinement, ou sous de faux prétextes, recueille, ou cherche à recueillir, des informations dans la zone d'opérations d'un belligérant, avec l'intention de les communiquer à la partie adverse.

Ainsi les militaires non déguisés qui ont pénétré dans la zone d'opérations de l'armée ennemie, à l'effet de recueillir des informations, ne sont pas considérés comme espions. De même, ne sont pas considérés comme espions: les militaires et les non-militaires, accomplissant ouvertement leur mission, chargés de transmettre des dépêches destinées soit à leur propre armée, soit à l'armée ennemie. A cette catégorie appartiennent également les individus envoyés en ballon pour transmettre les dépêches, et, en général, pour entretenir les communications entre les diverses parties d'une armée ou d'un territoire.

Art. 30. L'espion pris sur le fait ne pourra être puni sans jugement préalable.

Art. 31. L'espion qui, ayant rejoint l'armée à laquelle il appartient, est capturé plus tard par l'ennemi, est traité comme prisonnier de guerre, et n'encourt aucune responsabilité pour ses actes d'espionnage antérieurs.

Chapitre III.—*Des Parlementaires*

Art. 32. Est considéré comme parlementaire l'individu autorisé par l'un des belligérants à entrer en pourparlers avec l'autre et se présentant avec le drapeau blanc. Il a droit à l'inviolabilité, ainsi que le trompette, clarion, ou tambour, le porte-drapeau, et l'interprète qui l'accompagneraient.

Art. 33. Le Chef auquel un parlementaire est expédié n'est pas obligé de le recevoir en toutes circonstances.

Il peut prendre toutes les mesures nécessaires afin d'empêcher le parlementaire de profiter de sa mission pour se renseigner.

Il a le droit, en cas d'abus, de retenir temporairement le parlementaire.

Art. 34. Le parlementaire perd ses droits d'inviolabilité s'il est prouvé, d'une manière positive et irrécusable, qu'il a profité de sa position privilégiée pour provoquer ou commettre un acte de trahison.

Chapitre IV.—*Des Capitulations*

Art. 35. Les Capitulations arrêtées entre les Parties Contractantes doivent tenir compte des règles de l'honneur militaire.

Une fois fixées, elles doivent être scrupuleusement observées par les deux parties.

Chapitre V.—*De l'Armistice*

Art. 36. L'armistice suspend les opérations de guerre par un accord mutuel des parties belligérantes. Si la durée n'en est pas déterminée, les parties belligérantes peuvent reprendre en tout temps les opérations, pourvu toutefois que l'ennemi soit averti en temps convenu, conformément aux conditions de l'armistice.

Art. 37. L'armistice peut être général ou local. Le premier suspend partout les opérations de guerre des Etats belligérants ;

le second, seulement entre certaines fractions des armées belligérantes et dans un rayon déterminé.

Art. 38. L'armistice doit être notifié officiellement et en temps utile aux autorités compétentes et aux troupes. Les hostilités sont suspendues immédiatement après la notification ou au terme fixé.

Art. 39. Il dépend des Parties Contractantes de fixer, dans les clauses de l'armistice, les rapports qui pourraient avoir lieu, sur le théâtre de la guerre, avec les populations et entre elles.

Art. 40. Toute violation grave de l'armistice, par l'une des Parties, donne à l'autre le droit de le dénoncer, et même, en cas d'urgence, de reprendre immédiatement les hostilités.

Art. 41. La violation des clauses de l'armistice, par des particuliers agissant de leur propre initiative, donne droit seulement à réclamer la punition des coupables, et s'il y a lieu, une indemnité pour les pertes éprouvées.

Section III.—*De l'Autorité Militaire sur le Territoire de l'État Ennemi*

Art. 42. Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie.

L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.

Art. 43. L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics, en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.

Art. 44. Il est interdit de forcer la population d'un territoire occupé à prendre part aux opérations militaires contre son propre pays.

Art. 45. Il est interdit de contraindre la population d'un territoire occupé à prêter serment à la Puissance ennemie.

Art. 46. L'honneur et les droits de la famille, la vie des individus, et la propriété privée, ainsi que les convictions religieuses et l'exercice des cultes, doivent être respectés.

La propriété privée ne peut pas être confisquée.

Art. 47. Le pillage est formellement interdit.

Art. 48. Si l'occupant prélève, dans le territoire occupé, les impôts, droits et péages établis au profit de l'Etat, il le fera, autant que possible, d'après les règles de l'assiette et de la répartition en vigueur, et il en résultera pour lui l'obligation de pour-

voir aux frais de l'administration du territoire occupé dans la mesure où le Gouvernement légal y était tenu.

Art. 49. Si, en dehors des impôts visés à l'Article précédent, l'occupant prélève d'autres contributions en argent dans le territoire occupé, ce ne pourra être que pour les besoins de l'armée ou de l'administration de ce territoire.

Art. 50. Aucune peine collective, pécuniaire, ou autre, ne pourra être édictée contre les populations à raison de faits individuels dont elles ne pourraient être considérées comme solidairement responsables.

Art. 51. Aucune contribution ne sera perçue qu'en vertu d'un ordre écrit et sous la responsabilité d'un Général-en-chef.

Il ne sera procédé, autant que possible, à cette perception que d'après les règles de l'assiette et de la répartition des impôts en vigueur.

Pour toute contribution un reçu sera délivré aux contribuables.

Art. 52. Des réquisitions en nature et des services ne pourront être réclamés des communes ou des habitants que pour les besoins de l'armée d'occupation. Ils seront en rapport avec les ressources du pays et de telle nature qu'ils n'impliquent pas pour les populations l'obligation de prendre part aux opérations de la guerre contre leur patrie.

Ces réquisitions et ces services ne seront réclamés qu'avec l'autorisation du Commandant dans la localité occupée.

Les prestations en nature seront, autant que possible, payées au comptant ; sinon, elles seront constatées par des reçus.

Art. 53. L'armée qui occupe un territoire ne pourra saisir que le numéraire, les fonds, et les valeurs exigibles appartenant en propre à l'État, les dépôts d'armes, moyen de transport, magasins et approvisionnements, et, en général, toute propriété mobilière de l'État de nature à servir aux opérations de la guerre.

Le matériel de chemins de fer, les télégraphes de terre, les téléphones, les bateaux à vapeur et autres navires, en dehors des cas régis par la loi maritime, de même que les dépôts d'armes, et en général toute espèce de munitions de guerre, même appartenant à des Sociétés ou à des personnes privées, sont également des moyens de nature à servir aux opérations de la guerre, mais devront être restitués, et les indemnités seront réglées à la paix.

Art. 54. Le matériel des chemins de fer provenant d'Etats neutres, qu'il appartienne à ces États ou à des Sociétés ou personnes privées, leur sera renvoyé aussitôt que possible.

Art. 55. L'État occupant ne se considérera que comme administrateur et usufruitier des édifices publics, immeubles, forêts, et exploitations agricoles appartenant à l'État ennemi et se trouvant dans le pays occupé. Il devra sauvegarder le fond de ces propriétés et les administrer conformément aux règles de l'usufruit.

Art. 56. Les biens de communes, ceux des établissements consacrés aux cultes, à la charité, et à l'instruction, aux arts et aux sciences, même appartenant à l'État, seront traités comme la propriété privée.

Toute saisie, destruction, ou dégradation intentionnelle de semblables établissements, de monuments historiques, d'œuvres d'art et de science, est interdite, et doit être poursuivie.

Section IV.—*Des Belligérants internés et des Blessés soignés chez les Neutres*

Art. 57. L'État neutre qui reçoit sur son territoire des troupes appartenant aux armées belligérantes, les internera, autant que possible, loin du théâtre de la guerre.

Il pourra les garder dans des camps, et même les enfermer dans des forteresses ou dans des lieux appropriés à cet effet.

Il décidera si les officiers peuvent être laissés libres en prenant l'engagement sur parole de ne pas quitter le territoire neutre sans autorisation.

Art. 58. A défaut de Convention spéciale, l'État neutre fournira aux internés les vivres, les habillements, et les secours commandés par l'humanité.

Bonification sera faite, à la paix, des frais occasionnés par l'internement.

Art. 59. L'État neutre pourra autoriser le passage sur son territoire des blessés ou malades appartenant aux armées belligérantes, sous la réserve que les trains qui les amèneront ne transporteront ni personnel ni matériel de guerre. En pareil cas, l'État neutre est tenu de prendre les mesures de sûreté et de contrôle nécessaires à cet effet.

Les blessés ou malades amenés dans ces conditions sur le territoire neutre par un des belligérants, et qui appartiendraient à la partie adverse, devront être gardés par l'Etat neutre, de manière qu'ils ne puissent de nouveau prendre part aux opérations de la guerre. Celui-ci aura les mêmes devoirs quant aux blessés ou malades de l'autre armée qui lui seraient confiés.

Art. 60. La Convention de Genève s'applique aux malades et aux blessés internés sur territoire neutre.

APPENDIX VII

INTERNATIONAL CONVENTION FOR THE ADAPTATION TO MARITIME WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION OF AUGUST 22, 1864

Signed at the Hague, July 29, 1899

Article I

Les bâtiments-hôpitaux militaires, c'est-à-dire les bâtiments construits ou aménagés par les Etats spécialement et uniquement en vue de porter secours aux blessés, malades, et naufragés, et dont les noms auront été communiqués, à l'ouverture ou au cours des hostilités, en tout cas avant toute mise en usage, aux Puissances belligérantes, sont respectés et ne peuvent être capturés pendant la durée des hostilités.

Ces bâtiments ne sont pas non plus assimilés aux navires de guerre au point de vue de leur séjour dans un port neutre.

Article II

Les bâtiments-hospitaliers, équipés en totalité ou en partie aux frais des particuliers ou des Sociétés de Secours officiellement reconnues, sont également respectés et exempts de capture, si la Puissance belligérante dont ils dépendent leur a donné une commission officielle et en a notifié les noms à la Puissance adverse à l'ouverture ou au cours des hostilités, en tout cas avant toute mise en usage.

Ces navires doivent être porteurs d'un document de l'autorité compétente déclarant qu'ils ont été soumis à son contrôle pendant leur armement et à leur départ final.

Article III

Les bâtiments-hospitaliers, équipés en totalité ou en partie aux frais des particuliers ou des Sociétés officiellement reconnues

de pays neutres, sont respectés et exempts de capture, si la Puissance neutre dont ils dépendent leur a donné une commission officielle et en a notifié les noms aux Puissances belligérantes à l'ouverture ou au cours des hostilités, en tout cas avant toute mise en usage.

ARTICLE IV

Les bâtiments qui sont mentionnés dans les Articles I, II, et III, porteront secours et assistance aux blessés, malades, et naufragés des belligérants sans distinction de nationalité.

Les Gouvernements s'engagent à n'utiliser ces bâtiments pour aucun but militaire.

Ces bâtiments ne devront gêner en aucune manière les mouvements des combattants.

Pendant et après le combat, ils agiront à leurs risques et périls.

Les belligérants auront sur eux le droit de contrôle et de visite ; ils pourront refuser leur concours, leur enjoindre de s'éloigner, leur imposer une direction déterminée, et mettre à bord un commissaire, même les détenir, si la gravité des circonstances l'exigeait.

Autant que possible, les belligérants inscriront sur le journal de bord des bâtiments-hospitaliers les ordres qu'ils leur donneront.

ARTICLE V

Les bâtiments-hôpitaux militaires seront distingués par une peinture extérieure blanche avec une bande horizontale verte d'un mètre et demi de largeur environ.

Les bâtiments qui sont mentionnés dans les Articles II et III seront distingués par une peinture extérieure blanche avec une bande horizontale rouge d'un mètre et demi de largeur environ.

Les embarcations des bâtiments qui viennent d'être mentionnés, comme les petits bâtiments qui pourront être affectés au service hospitalier, se distingueront par une peinture analogue.

Tous les bâtiments-hospitaliers se feront reconnaître en hissant, avec leur pavillon national, le pavillon blanc à croix rouge prévu par la Convention de Genève.

ARTICLE VI

Les bâtiments de commerce, yachts, ou embarcations neutres, portant ou recueillant des blessés, des malades, ou des naufragés

des belligérants, ne peuvent être capturés pour le fait de ce transport, mais ils restent exposés à la capture pour les violations de neutralité qu'ils pourraient avoir commises.

Article VII

Le personnel religieux, médical, et hospitalier de tout bâtiment capturé est inviolable et ne peut être fait prisonnier de guerre. Il emporte, en quittant le navire, les objets et les instruments de chirurgie qui sont sa propriété particulière.

Ce personnel continuera à remplir ses fonctions tant que cela sera nécessaire et il pourra ensuite se retirer lorsque le Commandant-en-chef le jugera possible.

Les belligérants doivent assurer à ce personnel tombé entre leurs mains la jouissance intégrale de son traitement.

Article VIII

Les marins et les militaires embarqués blessés ou malades, à quelque nation qu'ils appartiennent, seront protégés et soignés par les capteurs.

Article IX

Sont prisonniers de guerre les naufragés, blessés, ou malades d'un belligérant qui tombent au pouvoir de l'autre. Il appartient à celui-ci de décider, suivant les circonstances, s'il convient de les garder, de les diriger sur un port de sa nation, sur un port neutre, ou même sur un port de l'adversaire. Dans ce dernier cas, les prisonniers ainsi rendus à leur pays ne pourront servir pendant la durée de la guerre.

Article X

(Exclu.) *

Article XI

Les règles contenues dans les Articles ci-dessus ne sont obligatoires que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

* The text of this Article was as follows [Ed.] :—

"Les naufragés, blessés ou malades, qui sont débarqués dans un porte neutre, du consentement de l'autorité locale, devront, à moins d'un arrangement contraire de l'État neutre avec les États belligérants, être gardés par l'État neutre de manière qu'ils ne puissent pas de nouveau prendre part aux opérations de la guerre."

Les dites règles cesseront d'être obligatoires du moment où, dans une guerre entre des Puissances Contractantes, une Puissance non-contractante se joindrait à l'un des belligérants.

Article XII

La présente Convention sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Article XIII

Les Puissances non-signataires, qui auront accepté la Convention de Genève du 22 Août, 1864, sont admises à adhérer à la présente Convention.

Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

Article XIV

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Convention, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi les Plénipotentiaires ont signé la présente Convention, et l'ont revêtue de leur cachets.

Fait à La Haye, le vingt-neuf Juillet, mil huit cent quatre-vingt-dix-neuf, en un seul exemplaire qui restera déposé dans les archives du Gouvernement des Pays-Bas, et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

APPENDIX VIII

DECLARATION CONCERNING EXPANDING (DUM-DUM) BULLETS

Signed at the Hague, July 29, 1899

Les Soussignés, Plénipotentiaires des Puissances représentées à la Conférence Internationale de la Paix à la Haye, dûment autorisés à cet effet par leurs Gouvernements, s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de Saint-Pétersbourg du 29 Novembre (11 Décembre), 1868,

Déclarent :

Les Puissances Contractantes s'interdisent l'emploi de balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain, telles que les balles à enveloppe dure dont l'enveloppe ne couvrirait pas entièrement le noyau ou serait pourvue d'incisions.

La présente Déclaration n'est obligatoire que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où dans une guerre entre des Puissances Contractantes, une Puissance non-Contractante se joindrait à l'un des belligérants.

La présente Déclaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Les Puissances non-Signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Déclaration et l'ont revêtue de leurs cachets.

Fait à La Haye, le 29 Juillet, 1899, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

APPENDIX IX

DECLARATION CONCERNING THE LAUNCHING OF PROJECTILES FROM BALLOONS

Signed at the Hague, July 29, 1899

Les Soussignés, Plénipotentiaires des Puissances représentées à la Conférence Internationale de la Paix à la Haye, dûment autorisés à cet effet par leurs Gouvernements, s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de Saint-Pétersbourg du 29 Novembre (11 Décembre), 1868,

Déclarent :

Les Puissances Contractantes consentent, pour une durée de cinq ans, à l'interdiction de lancer des projectiles et des explosifs du haut de ballons ou par d'autres modes analogues nouveaux.

La présente Déclaration n'est obligatoire que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où dans une guerre entre des Puissances Contractantes, une Puissance non-Contractante se joindrait à l'un des belligérants.

La présente Déclaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à La Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Les Puissances non-Signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes

dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Déclaration et l'ont revêtue de leurs cachets.

Fait à La Haye, le 29 Juillet, 1899, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

APPENDIX X

DECLARATION CONCERNING THE DIFFUSION OF ASPHYXIATING GASES

Signed at the Hague, July 29, 1899

Les Soussignés, Plénipotentiaires des Puissances représentées à la Conférence Internationale de la Paix à la Haye, dûment autorisés à cet effet par leurs Gouvernements, s'inspirant des sentiments qui ont trouvé leur expression dans la Déclaration de Saint-Pétersbourg du 29 Novembre (11 Décembre), 1868,

Déclarent :

Les Puissances Contractantes s'interdisent l'emploi de projectiles qui ont pour but unique de répandre des gaz asphyxiants ou délétères.

La présente Déclaration n'est obligatoire que pour les Puissances Contractantes, en cas de guerre entre deux ou plusieurs d'entre elles.

Elle cessera d'être obligatoire du moment où dans une guerre entre des Puissances Contractantes une Puissance non-Contractante se joindrait à l'un des belligérants.

La présente Declaration sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à la Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances Contractantes.

Les Puissances non-Signataires pourront adhérer à la présente Déclaration. Elles auront, à cet effet, à faire connaître leur adhésion aux Puissances Contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances Contractantes.

S'il arrivait qu'une des Hautes Parties Contractantes

dénonçât la présente Déclaration, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances Contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Déclaration et l'ont revêtue de leurs cachets.

Fait à la Haye, le 29 Juillet, 1899, en un seul exemplaire, qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances Contractantes.

APPENDIX XI

THE NAVAL PRIZE ACT, 1864

27 & 28 Vict., Chapter 25

An Act for regulating Naval Prize of War.

[23d. *June* 1864.]

Whereas it is expedient to enact permanently, with Amendments, such Provisions concerning Naval Prize, and Matters connected therewith, as have heretofore been usually passed at the Beginning of a War:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Preliminary

1. This Act may be cited as The Naval Prize Act, 1864.

Short Title.

2. In this Act—

Interpretation of Terms.

The Term "the Lords of the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the Office of Lord High Admiral:

The Term "the High Court of Admiralty" means the High Court of Admiralty of *England:*

The Term "any of Her Majesty's Ships of War" includes any of Her Majesty's Vessels of War, and any hired armed Ship or Vessel in Her Majesty's Service:

The Term "Officers and Crew" includes Flag Officers, Commanders, and other Officers, Engineers, Seamen, Marines, Soldiers, and others on board any of Her Majesty's Ships of War:

The Term "Ship" includes Vessel and Boat, with the Tackle, Furniture, and Apparel of the Ship, Vessel, or Boat:

The Term "Ship Papers" includes all Books, Passes, Sea Briefs, Charter Parties, Bills of Lading, Cockets, Letters, and other Documents and Writings delivered up or found on board a captured Ship:

The Term "Goods" includes all such Things as are by the Course of Admiralty and Law of Nations the Subject of Adjudication as Prize (other than Ships).

I.—Prize Courts

High Court of Admiralty and other Courts to be Prize Courts for Purposes of Act.

3. The High Court of Admiralty, and every Court of Admiralty or of Vice-Admiralty, or other Court exercising Admiralty Jurisdiction in Her Majesty's Dominions, for the Time being authorized to take cognizance of and judicially proceed in Matters of Prize, shall be a Prize Court within the Meaning of this Act.

Every such Court, other than the High Court of Admiralty, is comprised in the Term "Vice-Admiralty Prize Court," when hereafter used in this Act.

High Court of Admiralty

Jurisdiction of High Court of Admiralty.

4. The High Court of Admiralty shall have Jurisdiction throughout Her Majesty's Dominions as a Prize Court.

The High Court of Admiralty as a Prize Court shall have Power to enforce any Order or Decree of a Vice-Admiralty Prize Court, and any Order or Decree of the Judicial Committee of the Privy Council in a Prize Appeal.

Appeal; Judicial Committee

Appeal to Queen in Council, in what Cases.

5. An Appeal shall lie to Her Majesty in Council from any Order or Decree of a Prize Court, as of Right in case of a Final Decree, and in other Cases with the Leave of the Court making the Order or Decree.

Every Appeal shall be made in such Manner and Form and subject to such Regulations (including Regulations as to Fees, Costs, Charges, and Expenses) as may for the Time being be directed by Order in Council, and in the Absence of any such Order, or so far as any such Order does not extend, then in such Manner and Form and subject to such Regulations as are for the Time being prescribed or in force respecting Maritime Causes of Appeal.

Jurisdiction of Judicial Committee in Prize Appeals.

6. The Judicial Committee of the Privy Council shall have Jurisdiction to hear and report on any such Appeal, and may therein exercise all such Powers as for the Time being appertain to them in respect of Appeals from any Court of Admiralty Jurisdiction, and all such Powers as are under this Act vested in the High Court of Admiralty, and all such Powers as were wont to be exercised by the Commissioners of Appeal in Prize Causes.

Custody of Processes, Papers, &c.

7. All Processes and Documents required for the Purposes of any such Appeal shall be transmitted to and shall remain in the Custody of the Registrar of Her Majesty in Prize Appeals.

Limit of Time for Appeal.

8. In every such Appeal the usual Inhibition shall be extracted from the Registry of Her Majesty in Prize Appeals within Three Months after the Date of the Order or Decree appealed from if the Appeal be from the High Court of Admiralty, and within Six Months after that Date if it be from a Vice-Admiralty Prize Court.

The Judicial Committee may, nevertheless, on sufficient Cause shown, allow the Inhibition to be extracted and the Appeal to be prosecuted after the Expiration of the respective Periods aforesaid.

Vice-Admiralty Prize Courts

Enforcement of Orders of High Court, &c.

9. Every Vice-Admiralty Prize Court shall enforce within its Jurisdiction all Orders and Decrees of the Judicial Committee in Prize Appeals and of the High Court of Admiralty in Prize Causes.

Salaries of Judges of Vice-Admiralty Prize Courts.

10. Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court a Salary not exceeding Five hundred Pounds a Year, payable out of Money provided by Parliament, subject to such Regulations as seem meet.

A Judge to whom a Salary is so granted shall not be entitled to any further Emolument, arising from Fees or otherwise, in respect of Prize Business transacted in his Court.

An Account of all such Fees shall be kept by the Registrar of the Court, and the Amount thereof shall be carried to and form Part of the Consolidated Fund of the United Kingdom.

Retiring Pensions of Judges, as in 22 & 23 Vict. c. 26.

11. In accordance, as far as Circumstances admit, with the Principles and Regulations laid down in The Superannuation Act, 1859, Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court an annual or other Allowance, to take effect on the Termination of his Service, and to be payable out of Money provided by Parliament.

Returns from Vice-Admiralty Prize Courts.

12. The Registrar of every Vice-Admiralty Prize Court shall, on the First Day of *January* and First Day of *July* in every Year, make out a Return (in such Form as the Lords of the Admiralty from Time to Time direct) of all Cases adjudged in the Court since the last half-yearly Return, and shall with all convenient Speed send the same to the Registrar of the High Court of Admiralty, who shall keep the same in the Registry of that Court, and who shall, as soon as conveniently may be, send a Copy of the Returns of each Half Year to the Lords of the Admiralty, who shall lay the same before both Houses of Parliament.

General

General Orders for Prize Courts.

13. The Judicial Committee of the Privy Council, with the Judge of the High Court of Admiralty, may from Time to Time frame General Orders for regulating (subject to the Provisions of this Act) the Procedure and Practice of Prize Courts, and the Duties and Conduct of the Officers thereof and of the Practitioners therein, and for regulating the Fees to be taken by the Officers of the Courts, and the Costs, Charges, and Expenses to be allowed to the Practitioners therein.

Any such General Orders shall have full Effect, if and when approved by Her Majesty in Council, but not sooner or otherwise.

Every Order in Council made under this Section shall be laid before both Houses of Parliament.

Every such Order in Council shall be kept exhibited in a conspicuous Place in each Court to which it relates.

Prohibition of Officer of Prize Court acting as Proctor, &c.

14. It shall not be lawful for any Registrar, Marshal, or other Officer of any Prize Court, or for the Registrar of Her Majesty in Prize Appeals, directly or indirectly to act or be in any Manner concerned as Advocate, Proctor, Solicitor, or Agent, or otherwise, in any Prize Cause or Appeal, on pain of Dismissal or Suspension from Office, by Order of the Court or of the Judicial Committee (as the Case may require).

Prohibition of Proctors being concerned for adverse Parties in a Cause.

15. It shall not be lawful for any Proctor or Solicitor, or Person practising as a Proctor or Solicitor, being employed by a Party in a Prize Cause or Appeal, to be employed or concerned, by himself or his Partner, or by any other Person, directly or indirectly, by or on behalf of any adverse Party in that Cause or Appeal, on pain of Exclusion or Suspension from Practice in Prize Matters, by Order of the Court or of the Judicial Committee (as the Case may require).

II.—Procedure in Prize Causes

Proceedings by Captors

Custody of Prize Ship.

16. Every Ship taken as Prize, and brought into Port within the Jurisdiction of a Prize Court, shall forthwith, and without Bulk broken, be delivered up to the Marshal of the Court.

If there is no such Marshal, then the Ship shall be in like Manner delivered up to the principal Officer of Customs at the Port.

The Ship shall remain in the Custody of the Marshal, or of such Officer, subject to the Orders of the Court.

Bringing in of Ship Papers.

17. The Captors shall, with all practicable Speed after the Ship is brought into Port, bring the Ship Papers into the Registry of the Court.

The Officer in Command, or One of the Chief Officers of the capturing Ship, or some other Person who was present at the Capture, and saw the Ship Papers delivered up or found on board, shall make Oath that they are brought in as they were taken, without Fraud, Addition, Subduction, or Alteration, or else shall account on Oath to the Satisfaction of the Court for the Absence or altered Condition of the Ship Papers or any of them.

Where no Ship Papers are delivered up or found on board the captured Ship, the Officer in Command, or One of the Chief Officers of the capturing Ship, or some other Person who was present at the Capture, shall make Oath to that Effect.

Issue of Monition.

18. As soon as the Affidavit as to Ship Papers is filed, a Monition shall issue, returnable within Twenty Days from the Service thereof, citing all Persons in general to show Cause why the captured Ship should not be condemned.

Examinations on Standing Interrogatories.

19. The Captors shall, with all practicable Speed after the captured Ship is brought into Port, bring Three or Four of the principal Persons belonging to the captured Ship before the Judge of the Court or some Person authorized in this Behalf, by whom they shall be examined on Oath on the Standing Interrogatories.

The Preparatory Examinations on the Standing Interrogatories shall, if possible, be concluded within Five Days from the Commencement thereof.

Adjudication by Court.

20. After the Return of the Monition, the Court shall, on Production of the Preparatory Examinations and Ship Papers, proceed with all convenient Speed either to condemn or to release the captured Ship.

Further Proof.

21. Where, on Production of the Preparatory Examinations and Ship Papers, it appears to the Court doubtful whether the captured Ship is good Prize or not, the Court may direct further Proof to be adduced, either by Affidavit or by Examination of Witnesses, with or without Pleadings, or by Production of further Documents; and on such further Proof being adduced the Court shall with all convenient Speed proceed to Adjudication.

Custody, &c. of Ships of War.

22. The foregoing Provisions, as far as they relate to the Custody of the Ship, and to Examination on the Standing Interrogatories, shall not apply to Ships of War taken as Prize.

Claim

Entry of Claim; Security for Costs.

23. At any Time before Final Decree made in the Cause, any Person claiming an Interest in the Ship may enter in the Registry of the Court a Claim, verified on Oath.

Within Five Days after entering the Claim, the Claimant shall give Security for Costs in the Sum of Sixty Pounds; but the Court shall have Power to enlarge the Time for giving Security, or to direct Security to be given in a larger Sum, if the Circumstances appear to require it.

Appraisement

Power to Court to direct Appraisement.

24. The Court may, if it thinks fit, at any Time direct that the captured Ship be appraised.

Every Appraisement shall be made by competent Persons sworn to make the same according to the best of their Skill and Knowledge.

Delivery on Bail

Power to Court to direct Delivery to Claimant on Bail.

25. After Appraisement, the Court may, if it thinks fit, direct that the captured Ship be delivered up to the Claimant, on his giving Security to the Satisfaction of the Court to pay to the Captors the appraised Value thereof in case of Condemnation.

Sale

Power to Court to order Sale.

26. The Court may at any Time, if it thinks fit, on account of the Condition of the captured Ship, or on the Application of a Claimant, order that the captured Ship be appraised as aforesaid (if not already appraised), and be sold.

Sale on Condemnation.

27. On or after Condemnation the Court may, if it thinks fit, order that the Ship be appraised as aforesaid (if not already appraised), and be sold.

How Sales to be made.

28. Every Sale shall be made by or under the Superintendence of the Marshal of the Court or of the Officer having the Custody of the captured Ship.

Payment of Proceeds to Paymaster General or Official Accountant.

29. The Proceeds of any Sale, made either before or after Condemnation, and after Condemnation the appraised Value of the captured Ship, in case she has been delivered up to a Claimant on Bail, shall be paid under an Order of the Court either into the Bank of *England* to the Credit of Her Majesty's Paymaster General, or into the Hands of an Official Accountant (belonging to the Commissariat or some other Department) appointed for this Purpose by the Commissioners of Her Majesty's Treasury or by the Lords of the Admiralty, subject in either Case to such Regulations as may from Time to Time be made, by order in Council, as to the Custody and Disposal of Money so paid.

Small armed Ships

One Adjudication as to several small Ships.

30. The Captors may include in One Adjudication any Number, not exceeding Six, of armed Ships not exceeding One hundred Tons each, taken within Three Months next before Institution of Proceedings.

Goods

Application of foregoing Provisions to Prize Goods.

31. The foregoing Provisions relating to Ships shall extend and apply, *mutatis mutandis*, to Goods taken as Prize on board Ship; and the Court may direct such Goods to be unladen, inventoried, and warehoused.

Monition to Captors to proceed

Power to Court to call on Captors to proceed to Adjudication.

32. If the Captors fail to institute or to prosecute with Effect Proceedings for Adjudication, a Monition shall, on the Application of a Claimant, issue against the Captors, returnable within Six Days from the Service thereof, citing them to appear and proceed to Adjudication; and on the Return thereof the Court shall either forthwith proceed to Adjudication or direct further Proof to be adduced as aforesaid and then proceed to Adjudication.

Claim on Appeal

Person intervening on Appeal to enter Claim.

33. Where any Person, not an original Party in the Cause, intervenes on Appeal, he shall enter a Claim, verified on Oath, and shall give Security for Costs.

III.—Special Cases of Capture

Land Expeditions

Jurisdiction of Prize Court in case of Capture in Land Expedition.

34. Where, in an Expedition of any of Her Majesty's Naval or Naval and Military Forces against a Fortress or Possession on Land, Goods belonging to the State of the Enemy or to a Public Trading Company of the Enemy exercising Powers of Government are taken in the Fortress or Possession, or a Ship is taken in Waters defended by or belonging to the Fortress or Possession, a Prize Court shall have Jurisdiction as to the Goods or Ship so taken, and any Goods taken on board the Ship, as in case of Prize.

Conjunct Capture with Ally

Jurisdiction of Prize Court in case of Expedition with Ally.

35. Where any Ship or Goods is or are taken by any of Her Majesty's Naval or Naval and Military Forces while acting in conjunction with any Forces of any of Her Majesty's Allies, a Prize Court shall have Jurisdiction as to the same as in case of Prize, and shall have Power, after Condemnation, to apportion the due Share of the Proceeds to Her Majesty's Ally, the proportionate Amount and the Disposition of which Share shall be such as may from Time to Time be agreed between Her Majesty and Her Majesty's Ally.

Joint Capture

Restriction on Petitions by asserted joint Captors.

36. Before Condemnation, a Petition on behalf of asserted joint Captors shall not (except by special Leave of the Court) be admitted, unless and until they give Security to the Satisfaction of the Court to contribute to the actual Captors a just Proportion of any Costs, Charges, or Expenses or Damages that may be incurred by or awarded against the actual Captors on account of the Capture and Detention of the Prize.

After Condemnation, such a Petition shall not (except by special Leave of the Court) be admitted unless and until the asserted joint Captors pay to the actual Captors a just Proportion of the Costs, Charges, and Expenses incurred by the actual Captors in the Case, and give such Security as aforesaid, and show sufficient Cause to the Court why their Petition was not presented before Condemnation.

Provided, that nothing in the present Section shall extend to the asserted Interest of a Flag Officer claiming to share by virtue of his Flag.

Offences against Law of Prize

In case of Offence by Captors, Prize to be reserved for Crown.

37. A Prize Court, on Proof of any Offence against the Law of Nations, or against this Act, or any Act relating to Naval Discipline, or against any Order in Council or Royal Proclamation, or of any Breach of Her Majesty's Instructions relating to Prize, or of any Act of Disobedience to the Orders of the Lords of the Admiralty, or to the Command of a Superior Officer, committed by the Captors in relation to any Ship or Goods taken as Prize, or in relation to any Person on board any such Ship, may, on Condemnation, reserve the Prize to Her Majesty's Disposal, notwithstanding any Grant that may have been made by Her Majesty in favour of Captors.

Pre-emption

Purchase by Admiralty for Public Service of Stores on board Foreign Ships.

38. Where a Ship of a Foreign Nation passing the Seas laden with Naval or Victualling Stores intended to be carried to a Port of any Enemy of Her Majesty is taken and brought into a Port of the United Kingdom, and the Purchase for the Service of Her Majesty of the Stores on board the Ship appears to the Lords of the Admiralty expedient without the Condemnation thereof in a Prize Court, in that Case the Lords of the Admiralty may purchase, on the Account or for the Service of Her Majesty, all or any of the Stores on board the Ship; and the Commissioners of Customs may permit the Stores purchased to be entered and landed within any Port.

Capture by Ship other than a Ship of War

Prizes taken by Ships other than Ships of War to be Droits of Admiralty.

39. Any Ship or Goods taken as Prize by any of the Officers and Crew of a Ship other than a Ship of War of Her Majesty shall, on Condemnation, belong to Her Majesty in Her Office of Admiralty.

IV.—Prize Salvage

Salvage to Re-captors of British Ship or Goods from Enemy.

40. Where any Ship or Goods belonging to any of Her Majesty's Subjects, after being taken as Prize by the Enemy, is or are retaken from the Enemy by any of Her Majesty's Ships of War, the same shall be restored by Decree of a Prize Court to the Owner, on his paying as Prize Salvage One Eighth Part of the Value of the Prize to be decreed and ascertained by the Court, or such Sum not exceeding One Eighth Part of the estimated Value of the Prize as may be agreed on between the

Owner and the Re-captors, and approved by Order of the Court; Provided, that where the Re-capture is made under Circumstances of special Difficulty or Danger, the Prize Court may, if it thinks fit, award to the Re-captors as Prize Salvage a larger Part than One Eighth Part, but not exceeding in any Case One Fourth Part, of the Value of the Prize.

Provided also, that where a Ship after being so taken is set forth or used by any of Her Majesty's Enemies as a Ship of War, this Provision for Restitution shall not apply, and the Ship shall be adjudicated on as in other Cases of Prize.

Permission to re-captured Ship to proceed on Voyage.

41. Where a Ship belonging to any of Her Majesty's Subjects, after being taken as Prize by the Enemy, is retaken from the Enemy by any of Her Majesty's Ships of War, she may, with the Consent of the Re-captors, prosecute her Voyage, and it shall not be necessary for the Re-captors to proceed to Adjudication till her Return to a Port of the United Kingdom.

The Master or Owner, or his Agent, may, with the Consent of the Re-captors, unload and dispose of the Goods on board the Ship before Adjudication.

In case the Ship does not, within Six Months, return to a Port of the United Kingdom, the Re-captors may nevertheless institute Proceedings against the Ship or Goods in the High Court of Admiralty, and the Court may thereupon award Prize Salvage as aforesaid to the Re-captors, and may enforce Payment thereof, either by Warrant of Arrest against the Ship or Goods, or by Monition and Attachment against the Owner.

V.—Prize Bounty

Prize Bounty to Officers and Crew present at Engagement with an Enemy.

42. If, in relation to any War, Her Majesty is pleased to declare, by Proclamation or Order in Council, Her Intention to grant Prize Bounty to the Officers and Crews of Her Ships of War, then such of the Officers and Crew of any of Her Majesty's Ships of War as are actually present at the taking or destroying of any armed Ship of any of Her Majesty's Enemies shall be entitled to have distributed among them as Prize Bounty a Sum calculated at the Rate of Five Pounds for each Person on board the Enemy's Ship at the Beginning of the Engagement.

Ascertainment of Amount of Prize Bounty by Decree of Prize Court.

43. The Number of the Persons so on board the Enemy's Ship shall be proved in a Prize Court, either by the Examinations on Oath of the Survivors of them, or of any Three or more of the Survivors, or if there is no Survivor by the Papers of the Enemy's Ship, or by the Examinations on Oath of Three or more of the Officers and Crew of Her Majesty's Ship, or by such other Evidence as may seem to the Court sufficient in the Circumstances.

The Court shall make a Decree declaring the Title of the Officers and Crew of Her Majesty's Ship to the Prize Bounty, and stating the Amount thereof.

The Decree shall be subject to Appeal as other Decrees of the Court.

Payment of Prize Bounty awarded.

44. On Production of an official Copy of the Decree the Commissioners of Her Majesty's Treasury shall, out of Money provided by Parliament, pay the Amount of Prize Bounty decreed, in such Manner as any Order in Council may from Time to Time direct.

VI.—Miscellaneous Provisions

Ransom

Power for regulating Ransom by Order in Council.

45. Her Majesty in Council may from Time to Time, in relation to any War, make such Orders as may seem expedient, according to Circumstances, for prohibiting or allowing, wholly or in certain Cases, or subject to any Conditions or Regulations or otherwise, as may from Time to Time seem meet, the ransoming or the entering into any Contract or Agreement for the ransoming of any Ship or Goods belonging to any of Her Majesty's Subjects, and taken as Prize by any of Her Majesty's Enemies.

Any Contract or Agreement entered into, and any Bill, Bond, or other Security given for Ransom of any Ship or Goods, shall be under the exclusive Jurisdiction of the High Court of Admiralty as a Prize Court (subject to Appeal to the Judicial Committee of the Privy Council), and if entered into or given in contravention of any such Order in Council shall be deemed to have been entered into or given for an illegal Consideration.

If any Person ransoms or enters into any Contract or Agreement for ransoming any Ship or Goods, in contravention of any such Order in Council, he shall for every such Offence be liable to be proceeded against in the High Court of Admiralty at the Suit of Her Majesty in Her Office of Admiralty, and on Conviction to be fined, in the Discretion of the Court, any Sum not exceeding Five hundred Pounds.

Convoy

Punishment of Masters of Merchant Vessels under Convoy disobeying Orders or deserting Convoy.

46. If the Master or other Person having the Command of any Ship of any of Her Majesty's Subjects, under the Convoy of any of Her Majesty's Ships of War, wilfully disobeys any lawful Signal, Instruction, or Command of the Commander of the Convoy, or without Leave deserts the Convoy, he shall be liable to be proceeded against in the High Court of Admiralty at the Suit of Her Majesty in Her Office of Admiralty, and upon Conviction to be fined, in the Discretion of the Court, any Sum not exceeding Five hundred Pounds, and to suffer Imprisonment for such Time, not exceeding One Year, as the Court may adjudge.

Customs Duties and Regulations.

Prize Ships and Goods liable to Duties and Forfeiture.

47. All Ships and Goods taken as Prize and brought into a Port of the United Kingdom shall be liable to and be charged with the same Rates and Charges and Duties of Customs as under any Act relating to the Customs may be chargeable on other Ships and Goods of the like Description ; and

All Goods brought in as Prize which would on the voluntary Importation thereof be liable to Forfeiture or subject to any Restriction under the Laws relating to the Customs, shall be deemed to be so liable and subject, unless the Commissioners of Customs see fit to authorize the Sale or Delivery thereof for Home Use or Exportation, unconditionally or subject to such Conditions and Regulations as they may direct.

Regulations of Customs to be observed as to Prize Ships and Goods.

48. Where any Ship or Goods taken as Prize is or are brought into a Port of the United Kingdom, the Master or other Person in charge or command of the Ship which has been taken or in which the Goods are brought shall, on Arrival at such Port, bring to at the proper Place of Discharge, and shall, when required by any Officer of Customs, deliver an Account in Writing under his Hand concerning such Ship and Goods, giving such Particulars relating thereto as may be in his Power, and shall truly answer all Questions concerning such Ship or Goods asked by any such Officer, and in default shall forfeit a Sum not exceeding One hundred Pounds, such Forfeiture to be enforced as Forfeitures for Offences against the Laws relating to the Customs are enforced, and every such Ship shall be liable to such Searches as other Ships are liable to, and the Officers of the Customs may freely go on board such Ship and bring to the Queen's Warehouse any Goods on board the same, subject, nevertheless, to such Regulations in respect of Ships of

War belonging to Her Majesty as shall from Time to Time be issued by the Commissioners of Her Majesty's Treasury.

Power for Treasury to remit Customs Duties in certain Cases.

49. Goods taken as Prize may be sold either for Home Consumption or for Exportation; and if in the former Case the Proceeds thereof, after Payment of Duties of Customs, are insufficient to satisfy the just and reasonable Claims thereon, the Commissioners of Her Majesty's Treasury may remit the whole or such Part of the said Duties as they see fit.

Perjury

Punishment of Persons guilty of Perjury.

50. If any Person wilfully and corruptly swears, declares, or affirms falsely in any Prize Cause or Appeal, or in any Proceeding under this Act, or in respect of any Matter required by this Act to be verified on Oath, or suborns any other Person to do so, he shall be deemed guilty of Perjury, or of Subornation of Perjury (as the Case may be), and shall be liable to be punished accordingly.

Limitation of Actions, &c.

Actions against Persons executing Act not to be brought without Notice, &c.

51. Any Action or Proceeding shall not lie in any Part of Her Majesty's Dominions against any Person acting under the Authority or in the Execution or intended Execution or in pursuance of this Act for any alleged Irregularity or Trespass, or other Act or Thing done or omitted by him under this Act, unless Notice in Writing (specifying the Cause of the Action or Proceeding) is given by the intending Plaintiff or Prosecutor to the intended Defendant One Month at least before the Commencement of the Action or Proceeding, nor unless the Action or Proceeding is commenced within Six Months next after the Act or Thing complained of is done or omitted, or, in case of a Continuation of Damage, within Six Months next after the doing of such Damage has ceased.

In any such Action the Defendant may plead generally that the Act or Thing complained of was done or omitted by him when acting under the Authority or in the Execution or intended Execution or in pursuance of this Act, and may give all special Matter in Evidence; and the Plaintiff shall not succeed if Tender of sufficient Amends is made by the Defendant before the Commencement of the Action; and in case no Tender has been made, the Defendant may, by Leave of the Court in which the Action is brought, at any Time pay into Court such Sum of Money as he thinks fit, whereupon such Proceeding and Order shall be had and made in and by the Court as may be had and

made on the Payment of Money into Court in an ordinary Action; and if the Plaintiff does not succeed in the Action, the Defendant shall receive such full and reasonable Indemnity as to all Costs, Charges, and Expenses incurred in and about the Action as may be taxed and allowed by the proper Officer, subject to Review; and though a Verdict is given for the Plaintiff in the Action he shall not have Costs against the Defendant, unless the Judge before whom the Trial is had certifies his Approval of the Action.

Any such Action or Proceeding against any Person in Her Majesty's Naval Service, or in the Employment of the Lords of the Admiralty, shall not be brought or instituted elsewhere than in the United Kingdom.

Petitions of Right

Jurisdiction of High Court of Admiralty on Petitions of Right in certain Cases, as in 23 & 24 Vict. c. 34.

52. A Petition of Right, under The Petitions of Right Act, 1860, may, if the Suppliant thinks fit, be intituled in the High Court of Admiralty, in case the Subject Matter of the Petition or any material Part thereof arises out of the Exercise of any Belligerent Right on behalf of the Crown, or would be cognizable in a Prize Court within Her Majesty's Dominions if the same were a Matter in dispute between private Persons.

Any Petition of Right under the last-mentioned Act, whether intituled in the High Court of Admiralty or not, may be prosecuted in that Court, if the Lord Chancellor thinks fit so to direct.

The Provisions of this Act relative to Appeal, and to the framing and Approval of General Orders for regulating the Procedure and Practice of the High Court of Admiralty, shall extend to the Case of any such Petition of Right intituled or directed to be prosecuted in that Court; and, subject thereto, all the Provisions of The Petitions of Right Act, 1860, shall apply, *mutatis mutandis*, in the Case of any such Petition of Right; and for the Purposes of the present Section the Terms "Court" and "Judge" in that Act shall respectively be understood to include and to mean the High Court of Admiralty and the Judge thereof, and other Terms shall have the respective Meanings given to them in that Act.

Orders in Council

Power to make Orders in Council.

53. Her Majesty in Council may from Time to Time make such Orders in Council as seem meet for the better Execution of this Act.

Order in Council to be gazetted, &c.

54. Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within Thirty Days after the making thereof, if Parliament is then sitting, and, if not, then within Thirty Days after the next Meeting of Parliament.

Savings

Not to affect Rights of Crown; Effect of Treaties, &c.

55. Nothing in this Act shall—

(1.) give to the Officers and Crew of any of Her Majesty's Ships of War any Right or Claim in or to any Ship or Goods taken as Prize or the Proceeds thereof, it being the Intent of this Act that such Officers and Crews shall continue to take only such Interest (if any) in the Proceeds of Prizes as may be from Time to Time granted to them by the Crown; or

(2.) affect the Operation of any existing Treaty or Convention with any Foreign Power; or

(3.) take away or abridge the Power of the Crown to enter into any Treaty or Convention with any Foreign Power containing any Stipulation that may seem meet concerning any Matter to which this Act relates; or

(4.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any Right, Power, or Prerogative of Her Majesty the Queen in right of Her Crown, or in right of Her Office of Admiralty, or any Right or Power of the Lord High Admiral of the United Kingdom, or of the Commissioners for executing the Office of Lord High Admiral; or

(5.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, the Jurisdiction or Authority of a Prize Court to take cognizance of and judicially proceed upon any Capture, Seizure, Prize, or Reprisal of any Ship or Goods, or to hear and determine the same, and, according to the Course of Admiralty and the Law of Nations, to adjudge and condemn any Ship or Goods, or any other Jurisdiction or Authority of or exerciseable by a Prize Court.

Commencement

Commencement of Act.

56. This Act shall commence on the Commencement of The Naval Agency and Distribution Act, 1864.

APPENDIX XII

THE PRIZE COURTS ACT, 1894

57 & 58 Vict., Chapter 39

An Act to make further provision for the establishment of Prize Courts, and for other purposes connected therewith.

[17th August 1894.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short Title.

1. This Act may be cited as the Prize Courts Act, 1894.

Constitution of Prize Courts in British Possessions.

2.—(1.) Any commission, warrant, or instructions from Her Majesty the Queen or the Admiralty for the purpose of commissioning or regulating the procedure of a prize court at any place in a British possession may, notwithstanding the existence of peace, be issued at any time, with a direction that the court shall act only upon such proclamation as herein-after mentioned being made in the possession.

(2.) Where any such commission, warrant, or instructions have been issued, then, subject to instructions from Her Majesty, the Vice-Admiral of such possession may, when satisfied, by information from a Secretary of State or otherwise, that war has broken out between Her Majesty and any foreign State, proclaim that war has so broken out, and thereupon the said commission, warrant, and instructions shall take effect as if the same had been issued after the breaking out of such war and such foreign State were named therein.

(3.) The said commission and warrant may authorise either a Vice-Admiralty Court or a Colonial Court of Admiralty, within the meaning of the Colonial Courts of Admiralty Act, 1890, to act as a prize court, and may establish a Vice-Admiralty Court for that purpose.

53 & 54 Vict. c. 27.

(4.) Any such commission, warrant, or instructions may be revoked or altered from time to time.

(5.) A court duly authorised to act as a prize court during any war shall after the conclusion of the war continue so to act in relation to, and finally dispose of, all matters and things which arose during the war, including all penalties and forfeitures incurred during the war.

Rules of Court for and Fees in Prize Courts. 27 & 28 Vict. c. 25.

3.—(1.) Her Majesty the Queen in Council may make rules of court for regulating, subject to the provisions of the Naval Prize Act, 1864, and this Act, the procedure and practice of prize courts within the meaning of that Act, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the courts, and the costs, charges, and expenses to be allowed to the practitioners therein.

(2.) Every rule so made shall, whenever made, take effect at the time therein mentioned, and shall be laid before both Houses of Parliament, and shall be kept exhibited in a conspicuous place in each court to which it relates.

(3.) This section shall be substituted for section thirteen of the Naval Prize Act, 1864, which section is hereby repealed.

27 & 28 Vict. c. 25.

(4.) If any Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, is authorised under this Act or otherwise to act as a prize court, all fees arising in respect of prize business transacted in the court shall be fixed, collected, and applied in like manner as the fees arising in respect of the Admiralty business of the court under the said Act.

53 & 54 Vict. c. 27.

As to Vice-Admiralty Courts.

4. Her Majesty the Queen in Council may make rules of court for regulating the procedure and practice, including fees and costs, in a Vice-Admiralty Court, whether under this Act or otherwise.

Repeal of 39 & 40 Geo. 3, c. 79, s. 25.

5. Section twenty-five of the Government of India Act, 1800, is hereby repealed.

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